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Recent Developments

Various Editors

RECENT DEVELOPMENTS

CONSTITUTIONAL LAW — FREEDOM OF SPEECH — FEDERAL COMMUNICATIONS COMMISSION'S FAIRNESS DOCTRINE IS CONSTITUTIONAL.

Red Lion Broadcasting Co. v. FCC (D.C. Cir. 1967)

In November 1964, Red Lion Broadcasting Co. presented *The Christian Crusade,* one of a series of radio programs which featured Rev. Billy James Hargis. During the course of the broadcast Rev. Hargis discussed a book entitled *Goldwater — Extremist of the Right,* and accused its author, Fred J. Cook, of having been discharged by the *New York World Telegram* for making unfounded televised accusations against a city official. Red Lion, in violation of the requirements of the Federal Communications Commission's fairness doctrine,[1] failed to send a transcript of the program to Mr. Cook or to offer him free time to reply.[2] Consequently, in response to Cook's complaint, the FCC ordered Red Lion to comply. After extended negotiation between the FCC and Red Lion failed to produce a mutually acceptable solution, the broadcasting station challenged the constitutionality of the fairness doctrine in the United States Court of Appeals for the District of Columbia Circuit. In rejecting petitioners' broad-based attack on the doctrine, the court *held* that it violates neither the first, fifth, ninth, nor tenth amendments. *Red Lion Broadcasting Co. v. FCC,* 381 F.2d 908 (D.C. Cir. 1967), *cert. granted,* U.S.L.W. 3221 (U.S. Dec. 5, 1967) (No. 600).

During the formative stage of the radio industry it became apparent that government regulation would be needed to facilitate the distribution of the limited number of available broadcast frequencies among the myriad of potential entrepreneurs. Consequently, Congress, through the Communications Act of 1934,[3] created the Federal Communications Commission[4] to regulate the broadcasting industry in the "public interest,"[5]

1. The fairness doctrine as it exists today is enunciated in 25 P & F RADIO REG. 1899 (1963), and 29 Fed. Reg. 10415 (1964) (hereinafter cited as the *Fairness Primer*). For a development of the rule in the decisions of the FCC, see Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation,* 30 GEO. WASH. L. REV. 1, 1-7 (1961).

2. The fairness doctrine requires that one attacked in his "honesty, character, integrity or like personal qualities" be provided with both a transcript of the program and free time to reply. 25 P & F RADIO REG. 1899, 1900 (1963); *Fairness Primer* 10420-21. *See Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1252 (1949) (hereinafter cited as the *Editorializing Report*).

3. 47 U.S.C. §§ 151-609 (1964).

4. 47 U.S.C. § 151 (1964).

5. 47 U.S.C. § 303(g) (1964).

and authorized the Commission to grant licenses to private enterprisers who were to act as public trustees in their use of the airwaves.[6]

Since direct access to the microphone was limited by the strictures of federal licensing, and by the finite spectrum of the broadcasting band, it was clear that provisions would have to be enacted to guarantee that the licensees did not stifle opinions opposed to their own.[7] Thus, the Radio Act of 1927[8] and the Communications Act of 1934[9] included the requirement that stations allot equal time to opposing political candidates. However, this provision was not a panacea, for the licensees could still effectively control opinion during non-election periods. As a consequence, the Federal Radio Commission,[10] and later the FCC,[11] denied applications for licenses from those who would, or did, employ their facilities to expound but one view.

The genesis of the current fairness doctrine can be found in the 1941 FCC opinion, *Mayflower Broadcasting Corp.*,[12] where the Commission ruled that if a controversial topic of public importance were aired, the licensee would be required to present all shades of opinion on that topic. This position was taken a step further in the 1949 *Editorializing Report*,[13] where the Commissioners, for the first time, placed on the broadcasters an affirmative duty to seek out those various shades of opinion. The doctrine attained its current stature in 1959 when Congress amended section 315 of the Communications Act of 1934[14] so as to sanction what previously had been merely an administrative ruling.[15]

The facts of the instant case specifically concern one aspect of this broad doctrine; the obligation to offer anyone who has been personally

6. *Editorializing Report* 1247. Earlier attempts to regulate broadcasting through licensing schemes were made by Congress in the act of Aug. 13, 1912, ch. 287, 37 Stat. 302 and the Radio Act of 1927, ch. 169, 44 Stat. 1162.

7. There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether. If franchises are extended to some it gives them unfair advantage over others. . . .

Great Lakes Broadcasting Co. v. Federal Radio Comm'n, 3 F.R.C. Ann. Rep. 32, 34 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir. 1930) as quoted in *Fairness Primer* 10426.

Unlike other modes of expression, radio inherently is not available to all. This is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.

NBC v. United States, 319 U.S. 190, 226 (1943).

8. Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162, 1170.

9. 47 U.S.C. § 315 (1964).

10. Trinity Methodist Church v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670 (D.C. Cir. 1931); Chicago Fed'n of Labor v. FRC, 3 F.R.C. Ann. Rep. 36 (1929), *aff'd*, 41 F.2d 422 (D.C. Cir. 1930); Great Lakes Broadcasting Co. v. FRC, 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930).

11. Laurence W. Harry, 13 F.C.C. 23 (1948); WBNX Broadcasting Co., 12 F.C.C. 805 (1948); Robert Harold Scott, 11 F.C.C. 372 (1946); United Broadcasting Co., 10 F.C.C. 515 (1945); Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941); Young Peoples Ass'n for the Propagation of the Gospel, 6 F.C.C. 178 (1938).

12. 8 F.C.C. 333 (1941).

13. *See* note 2 *supra*.

14. 47 U.S.C. § 315 (1964).

15. Equal Time Act, 47 U.S.C. § 315 (1964).

attacked free time to respond.[16] However, since both the arguments of petitioners and the counter-arguments of the Commission, as well as the reasoning of the court, are general in scope, it is the entire fairness doctrine which ultimately receives the approval of the court.

Red Lion's constitutional attack on the doctrine was multifaceted. In addition to alleging first amendment violations, it maintained that Congress had improperly delegated its authority,[17] and that, in violation of the fifth amendment, saleable airtime had been taken without due process of law.[18] It also urged that the doctrine violated the ninth and tenth amendments in that it usurped rights retained by the people and powers reserved to the states.[19] Since the overwhelming weight of authority is opposed to these latter contentions, this note will be limited to the first amendment problems that were raised.

Before considering the freedom of speech problems, several preliminary points should be noted. First, due to the unique technological limitations inherent in broadcasting, the air waves, unlike other modes of expression, are appropriately suited for government regulation, and this regulation has, on many occasions, withstood the attack that it is a per se violation of the first amendment.[20] Secondly, the broadcaster has, despite this regulation, a broad area in which he may say as he pleases. He has, for example, wide programming discretion, limited only by what is reasonably within the public interest.[21] Therefore, even under the fairness doc-

16. Note 2 *supra.*

17. On petitioners' allegation, based on Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964), and NAACP v. Button, 371 U.S. 415, 438 (1963), that 47 U.S.C. § 315 (1964), as amended, is not precise enough to pass constitutional muster, the court found that Congress had met the requirements of Yakus v. United States, 321 U.S. 414, 424–25 (1944), by dictating a legislative objective and reasonably concise and specifically enumerated standards to guide the commission in its administrative determination. In point of fact, numerous cases have held the legislative standard of serving the "public interest, convenience and necessity" to be a valid basis for the grant of legislative authority. *See* FCC v. RCA Communications, 346 U.S. 86, 89–91 (1953); NBC v. United States, 319 U.S. 190, 225–26 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137–38 (1940); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933); New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932).

18. Having found the necessary precision in the delegation of authority, petitioners' argument that the statute was so vague as to be violative of due process also fell. Red Lion's further contention that it had been denied due process because the charges of Rev. Hargis were not first ascertained to be false was summarily dismissed. The policy of free speech would be nullified if it could be exercised only by those with the "right" viewpoint. *See* Terminiello v. Chicago, 337 U.S. 1 (1949).

19. These objections have a threshold weakness in that the courts have already found congressional power to regulate broadcasting in the commerce clause. *See* NBC v. United States, 319 U.S. 190 (1942); Sablowsky v. United States, 101 F.2d 183, 189 (3d Cir. 1938).

20. NBC v. United States, 319 U.S. 190, 223 (1943); Idaho Microwave, Inc. v. FCC, 352 F.2d 729 (D.C. Cir. 1965); Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), *cert. denied,* 375 U.S. 951 (1963); Henry v. FCC, 302 F.2d 191 (D.C. Cir.), *cert. denied,* 371 U.S. 821 (1962); Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949); Bay State Beacon, Inc. v. FCC, 171 F.2d 826 (D.C. Cir. 1948); Simmons v. FCC, 169 F.2d 670 (D.C. Cir.), *cert. denied,* 335 U.S. 846 (1948).

21. Regents of New Mexico College of Agriculture and Mechanical Arts v. Albuquerque Broadcasting Co., 158 F.2d 900, 906 (10th Cir. 1947). *See Commissioners' Policy on Programming,* 20 P & F RADIO REG. 1901 (1960).

trine, he is completely free to raise any issue of public importance,[22] provided that he does not stifle the opinions of others. Whether this prohibition and the regulations that stem from it constitute a prior restraint on the broadcaster's freedom of speech or merely reasonable burdens imposed upon a public "trustee" as a means of protecting the interests of his "beneficiaries" is the real issue to be decided.

In essence, Red Lion contended that the fear of losing its license because of a violation of the fairness doctrine restrained it from voicing an opinion, or allowing its paying customers to speak, on public issues. It was further urged that the petitioners were forced to surrender their right of free speech as a condition to obtaining a license.[23]

In regard to the petitioners' contention that the doctrine imposes a prior restraint on its freedom of speech, the court reiterated that the licensees have wide programming discretion,[24] that there is no requirement to submit any material to any agency before airing it, and that the FCC is expressly forbidden to be a censor.[25] Addressing itself to the licensing scheme, the court found that the petitioners were not compelled to forfeit their right to speak on public issues as a condition to obtaining the license. The considerations of the public interest, convenience, and necessity are the only existing standards of eligibility for a license. Furthermore, because of technological limitations, the fairness doctrine is essential if those considerations are to be advanced. It was also felt that in the light of the protections of the Administrative Procedure Act,[26] accessibility to the courts, full access to the pertinent regulations,[27] and the FCC policy that no broadcaster shall lose his license for an honest mistake in judgment, the petitioner's de facto fear of loss of its license through capricious administrative action was unreasonable.

The conclusion of the court that no prior restraint exists and that there is therefore no first amendment violation, is justifiable. This is certainly not the classic prior restraint situation.[28] The problem is not one of dealing with newspapers, which, in every real sense, own their own medium, but with broadcasters who must obtain a license to use the *public* airwaves. Nor is there a throttling of the medium; rather, the situation is that once the medium speaks, it cannot stifle others. It is true that in this situation, as in the classic newspaper cases, the attacked victim has access to other modes of communication (*e.g.*, leaflets) to get his message across; however, it cannot be forgotten that these other media

22. The FCC enunciated the freedom which broadcasters have with respect to public issues in *Editorializing Report* 1250–51. They are even permitted to editorialize within reasonable limits, subject to the general requirements of fairness detailed by the report. *Id.* at 1252–56.

23. Compare the views of Commissioner Jones in the *Editorializing Report* 1264.

24. *See* note 22 *supra.*

25. 47 U.S.C. § 326 (1964).

26. 5 U.S.C. §§ 1001–11 (1964).

27. The pertinent regulations are reported in 25 P & F RADIO REG. 1899 (1963), and in the *Fairness Primer.*

28. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

are not as effective as broadcasting in reaching the public's ear, and it is the *public's* right to hear all sides of important issues that is paramount. It is felt that the policy of free speech would be emasculated rather than strengthened by any other decision.[29]

The conclusion that the requirements of the fairness doctrine are nothing more than reasonable burdens imposed upon a licensee when he obtains the privilege to use the public airwaves is buttressed by the following reasoning: Congress, in response to the obvious need to allocate the limited resource of the broadcast band, in a legitimate exercise of its power over commerce,[30] appropriated the band for the public use and designated the licensees public "trustees."[31] This appropriation and designation, in turn, is necessitated by the conviction that, in order to realize an effective self-governing society, the public must be fully exposed to all sides of public controversies.[32] Therefore, the licensees, when beaming discussions of public issues to their "beneficiaries," must be required to present all sides fairly and openly.

The court could have ended its analysis by recognizing the right of the public to hear, but it did not. By acknowledging that the fairness doctrine "recognizes and enforces the free speech right of the victim of any personal attack,"[33] it also upheld the offended individual's right to speak.

It should be noted that, unlike the rest of the opinion which applies to the entire fairness doctrine, the court's recognition of the victim's right to answer charges levied against him in a personal attack applies specifically to that one facet of the doctrine. Indeed, except in the case of a personal attack, the broadcaster is allowed wide discretion in choosing spokesmen for opposing viewpoints.[34] Therefore, this particular portion of the holding does not encroach upon the broadcaster's discretion, absent a personal attack, and a right to speak is not granted to *everyone* who disagrees with a viewpoint aired by the licensee in question.

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29. *See* Associated Press v. United States, 326 U.S. 1 (1945); *Editorializing Report* 1248.

> It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some.

326 U.S. at 20.

It has been urged that the press, while not as technologically limited as the broadcaster media, is limited by practical economic limitations which are just as real. The declining number of American daily newspapers due to rising costs suggests that the same policy which necessitates imposing the fairness doctrine on broadcasters, compels such a doctrine on the press. *See* Barron, *Access to the Press — A New First Amendment Right,* 80 HARV. L. REV. 1641 n.36 (1967), and sources cited therein for a discussion of the declining newspaper industry.

30. *See* notes 17–19 *supra.*

31. *Editorializing Report* 1247.

32. *Id.* at 1249. *See* New York Times v. Sullivan, 376 U.S. 254 (1964); Terminiello v. Chicago, 337 U.S. 1 (1948); Thornhill v. Alabama, 310 U.S. 88 (1939).

33. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 924 (1967).

34. *See* note 2 *supra.*

The essence of the victim's recognized right to answer is, however, remarkably difficult to pin down. The expression of the court which characterizes the prerogative as a "free speech right" clearly establishes that it is more than a privilege;[35] however, it is not clear whether this "right" evolves from the first amendment or from the inherent technological limitations of the broadcast industry which require that facilities be concentrated in the hands of a few. This distinction is important, for if the right to access is limited to situations where the means of communication are, because of technological limitations, controlled by a relatively small group, the most expansive ramification of this holding would be the judicial acceptance of those arguments which call for its application to the entire press because of the economic limitations on the number of publications.[36] However, if this access right emanates from the first amendment, it lends support to those who argue that the courts should creatively construe the entire Bill of Rights so as to protect the public not only from the encroachments of the government but also from the improprieties of the large monolithic "private governments" — the labor unions, corporations, associations — which have flourished in the modern economy.[37] While the court did not specify the source of this right to respond, thus allowing for varied interpretations, both the tone of the opinion and the absence of reference to the first amendment as the wellspring of the right indicate that its decision was motivated by the peculiar problems of the broadcast industry[38] rather than by proscriptions of the first amendment.

But even if the court meant to say that the injured party actually had a first amendment right to speak, one theory on the constitutionality of the fairness doctrine would recognize this right and still be consistent with the proposition that the amendment only protects against the government and not private entrepreneurs. The actions of the broadcasters are given, through the licensing and renewal process, the authorization and ratification of the government. Since they are the "agents" of the government, their violation of the individual's right to speak will be imputed to the government as their "principal." Because the government cannot

35. *See Editorializing Report* 1258 (additional views of Commissioner Webster).

36. Barron, *Access to the Press — A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967); Donnelly, *Government and Freedom of the Press,* 45 ILL. L. REV. 31, 56 (1950); Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 902 (1963). Although the newspapers similarly are in the hands of a few, the question arises as to whether the economic factors limiting their number are of the same substance as the purely technological limitations restricting the number of broadcasters. If there is a qualitative difference between relative economic limitations and absolute technological restrictions, the theory that the press should also be subject to a fairness doctrine would fall.

37. Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine,* 37 U. COLORADO L. REV. 31, 44–45 (1964); Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620, 655–56 (1959).

38. The entire question of the victim's right to answer may be nothing more than dicta, since recognizing the victim's right to speak is in no way necessary for a determination of whether the broadcaster's first amendment right was violated. *See* Judge Fahy concurring in Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 930 (D.C. Cir. 1967).

do through its "agents" what it is forbidden to do directly, the fairness doctrine will protect the individual's first amendment rights against encroachment by government licensees.[39]

In order to appreciate the full effect of the court's upholding the constitutionality of the fairness doctrine in its entirety, it should be noted that last year the same court, for the first time, in *Office of Communication of the United Church of Christ v. FCC*,[40] conferred standing on the representatives of the listening public to intervene as parties in a license renewal case. This ruling also gives such representatives access to the courts to appeal adverse decisions of the FCC. Since parties with a very real interest can now utilize the newly court-approved fairness doctrine, the doctrine, which has not as a practical matter been completely effective in the past,[41] promises to be a much more significant force in the future.[42]

Joseph R. Wenk

CONSTITUTIONAL LAW — TAXATION — NONDISCRIMINATORY STATE SALES AND USE TAX ON NATIONAL BANK UPHELD NOTWITHSTANDING LACK OF CONGRESSIONAL AUTHORIZATION.

First Agricultural Nat'l Bank v. Tax Comm'n (Mass. 1967)

Plaintiff, a Massachusetts national bank organized under an act of Congress,[1] requested a ruling or an emergency regulation from the State Tax Commission that national banks are exempt from the Massachusetts sales and use tax.[2] Subsequently, the Commission issued an emergency regulation which stated that "[t]he sale, lease, or rental of tangible per-

39. Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLORADO L. REV. 31, 43–44 (1964). For analogous cases in the racial discrimination area, see Reitman v. Mulkey, 387 U.S. 369 (1967), *noted in* 13 VILL. L. REV. 199 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

If this conceptual approach were adopted, a question would arise as to whether the licensees, as "quasi-governmental agencies," would also be subject to other limitations imposed on the government by the Bill of Rights. For example, an argument could be made that under the establishment clause the licensees should be prohibited from broadcasting religious programs.

40. 359 F.2d 994 (D.C. Cir. 1966), *noted in* 31 ALBANY L. REV. 133 (1967), 16 AM. U.L. REV. 102 (1966) *and* 80 HARV. L. REV. 670 (1967).

41. *See* Friedenthal & Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445 (1959).

42. *See, e.g., FCC Upholds Decision on Giving Antismokers Air Time for Opinions*, Wall Street Journal, Sept. 11, 1967, at 32, col. 6 .

1. 12 U.S.C. § 21 (1964) (corresponds to National Bank Act of 1864, ch. 106, § 5, 13 Stat. 100).

2. MASS. ANN. LAWS ch. 58, §§ 1-2 (Supp. 1966).

sonal property to national banks . . . is subject to the sales and use tax."[3] Plaintiff thereupon filed a bill seeking a binding declaration[4] that it is exempt from the sales and use tax. The trial court heard the case but reserved decision for the Massachusetts Supreme Judicial Court which *held* that national banks do not have either a constitutional or federal statutory immunity from a nondiscriminatory state sales[5] and use tax.[6] *First Agricultural Nat'l Bank v. Tax Comm'n,* ..... Mass. ....., 229 N.E.2d 245 (1967), *appeal docketed,* 36 U.S.L.W. 3180 (U.S. Oct. 23, 1967) (No. 755).

From the time that *M'Culloch v. Maryland*[7] and the later case of *Osborn v. United States*[8] were decided, the implied constitutional immunity of national banks from state taxation has not been seriously questioned. In *M'Culloch,* Chief Justice Marshall, after deciding that national banks were a "necessary and proper" means of implementing the federal power over the monetary and fiscal policy of the United States,[9] held that a Maryland statute which imposed a discriminatory tax on the notes of the Second National Bank was repugnant to the federal statute which chartered the bank and was therefore constitutionally void because of the "supremacy clause."[10] In *Osborn,* Chief Justice Marshall reiterated the *M'Culloch* rationale, and found no merit to the contention that the proprietary operations of national banks should not be protected from state taxation.[11] In 1864, Congress, in passing section 41 of the National Bank

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3. The emergency regulation further stated: "National banks and Federal savings and loan associations making sales of tangible personal property must collect the sales tax to the same extent as other vendors making such sales." First Agricultural Nat'l Bank v. Tax Comm'n, ... Mass. ....., ..., 229 N.E.2d 245, 247 & n.1 (1967).

4. MASS. ANN. LAWS ch. 30A, § 7 (1966) authorizes declaratory relief.

5. The Massachusetts court determined that the legal incidence of the sales tax was upon the vendor and, employing the test enunciated in James v. Dravo Contracting Co., 302 U.S. 134 (1937), and Alabama v. King & Boozer, 314 U.S. 1 (1941), held that no implied constitutional immunity could be interposed to protect the national banks from the economic burden of the Massachusetts sales tax. On appeal to the Supreme Court this determination by the Massachusetts Supreme Judicial Court, that the legal incidence of the sales tax is on the vendor, is not subject to review. *See* Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 99 (1941), where the court stated: "These determinations of the incidence of the tax by the state court are controlling, and respondents concede the point."

6. The court was also faced with construing exemption sections of the Sales and Use Tax Act which excluded "agencies" of the United States from the act's operation. The court concluded that the state legislature did not intend that national banks should come within the purview of the "agency" exemption in holding: "At best, the plaintiff [national bank] is a *creature* of the United States and not entitled to an exemption as an agency of the United States." ..... Mass. at ....., 229 N.E.2d at 248. (emphasis added).

7. 17 U.S. (4 Wheat.) 316 (1819).

8. 22 U.S. (9 Wheat.) 738 (1824).

9. 17 U.S. (4 Wheat.) at 424.

10. *Id.* at 436. Chief Justice Marshall said:

> The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

11. 22 U.S. (9 Wheat.) 738, 861–68 (1824).

Act,[12] granted the states the right to tax the real estate of national banks and the capital stock of national banks in the hands of their stockholders, provided the other moneyed capital within the state was taxed in the same manner. After this enactment the majority of cases decided by the Supreme Court in the area of state taxation of national banks have been concerned with interpreting its provisions.[13] *Owensboro Nat'l Bank v. Owensboro*,[14] which struck down a nondiscriminatory state franchise tax as it applied to national banks, foreclosed resort by the states to any method of taxing national banks other than those prescribed by section 41 when the Court held that "[a]ny state tax therefore which is in excess of and not in conformity to these requirements [section 41] is void."[15]

In contravening the holdings of the *M'Culloch* and *Osborn* cases, the *First Agricultural* court did not explicitly direct its attention to either the necessary and proper or the supremacy aspects of Chief Justice Marshall's rationale. Rather, the court enunciated a standard which would subject federally created instrumentalities to a nondiscriminatory state tax when the instrumentalities are privately owned, profit-oriented corporations performing essentially proprietary functions.

Whether the governmental – proprietary[16] aspect of the court's test can be sustained depends upon the constitutional ramifications of segregating the operations of a federally created instrumentality into these categories. The significance of this dichotomy was discussed at some length by Chief Justice Marshall in *Osborn* where he decided that the private operations of a national bank could not be separated from its governmental functions, for Congress, in granting national banks the authority to participate in private profit-making activities, created a method of engrafting life upon the skeleton which it had created.[17] Furthermore,

12. Act of June 3, 1864, ch. 106, § 41, 13 Stat. 111, *as amended*, 12 U.S.C. § 548 (1964).

13. *E.g.*, Michigan Nat'l Bank v. Michigan, 365 U.S. 467 (1961); Colorado Nat'l Bank v. Bedford, 310 U.S. 41 (1940); Tradesmen Nat'l Bank v. Tax Comm'n, 309 U.S. 560 (1940); Baltimore Nat'l Bank v. Tax Comm'n, 297 U.S. 209 (1936); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931); First Nat'l Bank v. Hartford, 273 U.S. 548 (1927); Bank of Calif. v. Richardson, 248 U.S. 476 (1919); National Bank of Redemption v. Boston, 125 U.S. 60 (1888).

14. 173 U.S. 664 (1899).

15. *Id.* at 669.

16. The test established by the Massachusetts court has all the characteristics of the test established in South Carolina v. United States, 199 U.S. 437 (1905), where the Supreme Court upheld the state-controlled liquor agencies' susceptibility to federal taxation by distinguishing these agencies as being usually proprietary as opposed to other state agencies which are usually, or historically, governmental in character and which are immune from federal taxation. In the later case of New York v. United States, 326 U.S. 572, 584 (1946), Justice Frankfurter, after discussing problems which arise in applying this governmental–proprietary test, adopted a test which placed "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter." For a discussion of the propriety of state taxation of federal instrumentalities on the sole basis of reciprocity see Note, *State Taxation of Federal Instrumentalities: The Converse of South Carolina v. United States*, 49 HARV. L. REV. 1323 (1936).

17. 22 U.S. (9 Wheat.) at 861–62. Chief Justice Marshall said:

> It [lending and dealing in money] is, . . . the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle with the right to preserve the skeleton or body which it animates.

as long as these activities of lending and dealing in money were "so essential to the fiscal operations of the government, as to authorize Congress to confer them," then "the right to preserve them [must] exist. . . ."[18] If, however, these activities are not essential to the fiscal operations of the federal government, then "there will be much difficulty in sustaining that essential part of the charter."[19]

The difficulty to which Chief Justice Marshall referred stems from the rationale of the constitutionally implied immunity of national banks from state taxation. Basically, that rationale is that national banks are accorded immunity from state taxation because their creation, as necessary and proper federal instrumentalities, placed them within the ambit of the federal sovereign and, as the federal sovereign is supreme in relation to the state sovereign in areas where their respective sovereignties conflict, a grant of power to the states to tax the federal sovereign would undermine the concept of federal supremacy.[20] Therefore, it seems clear that if the governmental–proprietary test of taxability as set forth in the instant case is to be sustained, an attack on the reasoning in *M'Culloch* must proceed in either of the following ways: (1) national banks are no longer necessary and proper to implement the federal fiscal and monetary policy, or, (2) the absolute prohibition of direct state taxation is no longer a necessary standard for protecting the supremacy of the federal sovereign.

The *First Agricultural* court did not expressly hold that national banks are no longer a necessary and proper instrumentality of the federal government. The court did, however, place a great deal of emphasis on the growth in the proprietary functions of national banks and on the corresponding shift in duty to maintain a system of currency and currency control from national banks to the Federal Reserve System.[21] However, to rely on this shift as a basis for undermining the power of Congress to create, maintain, and control national banks is not to recognize the vital part which national banks play in the Federal Reserve System. The Federal Reserve System currently maintains control over the amount of money in circulation and the credit available for commercial transactions, primarily by establishing reserve requirements for time deposits held by its member banks.[22] Because national banks are required to be members of the Federal Reserve System,[23] they become the primary instrumentalities through which the Federal Reserve System operates to control the mone-

18. *Id.* at 864.

19. *Id.* at 861.

20. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

21. First Agricultural Nat'l Bank v. Tax Comm'n, ... Mass. ....., ..., 229 N.E.2d 245, 255 (1967), *appeal docketed,* 36 U.S.L.W. 3180 (U.S. Oct. 23, 1967) (No. 755). *See also* Colorado Nat'l Bank v. Bedford, 310 U.S. 41, 48 (1940); Plous & Baker, *McCulloch v. Maryland — Right Principle, Wrong Case,* 9 STAN. L. REV. 710, 720–21 (1957).

22. *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL RESERVE SYSTEM PURPOSES AND FUNCTIONS 13–30 (4th ed. 1961).

23. 12 U.S.C. § 222 (1964).

tary and fiscal policy of the United States.[24] In light of the integral relationship between the national banking system and the Federal Reserve System, it is understandable that the Massachusetts court did not expressly hold that national banks are no longer a necessary and proper exercise of federal power.[25]

Although it is not entirely clear that the *First Agricultural* court was directing an attack at the current propriety of the absolute prohibition of state taxation as the standard for protecting the supremacy of the federal sovereignty, it is clear that the court has made cogent observations that tend to support a reevaluation of this standard. Initially, the court observed that the Massachusetts use tax is not a discriminatory state tax which will either destroy or effectively control the national banking system, as was the situation faced by Chief Justice Marshall in *M'Culloch*.[26] The sole purpose of imposing this use tax on national banks as well as state banks is to create an equal burden upon those corporations which seek and receive "the benefits of State and local services, the protection of the laws of the State, access to its courts, and the patronage of its citizens."[27] Furthermore, the court observed that there are no current dissimilarities in the operations of national banks and state banks which justify the inequity of taxation which this absolute prohibition creates.[28] The only purpose served by such a standard is the elevation of national banks to a superior competitive position in the commercial banking market.[29] Finally, the burden of this tax will not be incurred by the federal treasury, but instead will be reflected in a reduction in the profits of the privately owned national banks.

If there is an area where state taxation of federal instrumentalities should be allowed to coincide with federal power, the Supreme Court has not so indicated. There are, however, cases which indicate that the Court is not adverse to state taxation which imposes the economic burden of the tax on the federal government or its instrumentalities as long as the legal incidence is on another.[30] Other cases indicate that the Court is not hostile to the establishment of a taxing parity between private corporations which are under contract with the federal government and those which are not.[31] But in none of these cases has the Supreme Court ex-

24. *See* Barnes v. Anderson Nat'l Bank, 293 Ky. 592, 601, 169 S.W.2d 833, 838 (1943).

25. Practically, the ramifications of such a holding would be incomprehensible. National banks would be in a hiatus of existence, and seemingly would only be permitted to continue operations upon the approval of the state in which they are located.

26. ..... Mass. at ....., 229 N.E.2d at 252.

27. *Id.* at ....., 229 N.E.2d at 258.

28. *Id.* at ....., 229 N.E.2d at 256.

29. *Id.* at ....., 229 N.E.2d at 258.

30. *E.g.*, Curry v. United States, 314 U.S. 14 (1941); Alabama v. King & Boozer, 314 U.S. 1 (1941); James v. Dravo Contracting Co., 302 U.S. 134 (1937).

31. *E.g.*, City of Detroit v. Murray Corp. of America, 355 U.S. 489 (1958); United States v. Township of Muskegon, 355 U.S. 484 (1958); United States v. City

pressly or impliedly held that federal instrumentalities are no longer protected by an absolute implied constitutional immunity from direct state taxation.[32] In fact, as recently as 1966, the Supreme Court has observed that national banks' "status as tax-immune instrumentalities of the United States is beyond dispute."[33] Thus, even if the test established in the instant case is more responsive to modern economic realities, the court seemingly overstepped its authority in redefining heretofore unquestioned principles of constitutional law.

Another obstacle which faced the Massachusetts court, in addition to the constitutional problems, was section 548 of the National Bank Act which states that "[t]he legislature of each State *may* determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. . . ."[34] The court in the instant case placed great reliance on the fact that no express immunity was granted in this statute, such as appears in several other similar statutes,[35] and found that absent any implied constitutional immunity the statute did nothing to control the power of the states to tax national banks.[36] The correctness of this decision depends upon whether section 548 carries an implied congressional immunity within itself or whether that implied immunity rests on the continuation of the constitutionally implied immunity established in *M'Culloch.* The Supreme Court,[37] and various state courts,[38] when presented with a taxing controversy involving a state and a national bank, have adopted the position that section 548 defines the extent to which a state can tax national banks. These courts have not, however, considered whether that section is based on an implied congressional grant of immunity or an implied constitutional immunity. From the legislative history, it would appear that in passing section 41 (now section 548) Congress was primarily con-

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of Detroit, 355 U.S. 466 (1958). For an analysis of prior decisions of the Supreme Court in the area of derivative governmental immunities see Powell, *The Waning of Intergovernmental Tax Immunities,* 58 HARV. L. REV. 633 (1945).

32. W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW — CASES — COMMENTS — QUESTIONS 460 (note d) (2d ed. 1967).

33. Department of Employment v. United States, 385 U.S. 355, 360 (1966).

34. 12 U.S.C. § 548 (1964) (emphasis added).

35. ..... Mass. at ..... n.23, 229 N.E.2d at 260 n.23.

36. *Id.* at ....., 229 N.E.2d at 259.

37. *E.g.,* First Nat'l Bank v. Anderson, 269 U.S. 341 (1926); Des Moines Nat'l Bank v. Fairweather, 263 U.S. 103 (1923); Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664 (1899); Davis v. Elmira Savings Bank, 161 U.S. 275 (1896).

38. *E.g.,* Western Lithograph Co. v. State Board of Equalization, 11 Cal. 2d 156, 78 P.2d 731 (1938); National Bank v. Isaacs, 27 Ill. 2d 205, 188 N.E.2d 704 (1963); National Bank v. Department of Revenue, 340 Mich. 573, 66 N.W.2d 237 (1954), *cert. denied,* 349 U.S. 934 (1955); Federal Reserve Bank v. Department of Revenue, 339 Mich. 587, 64 N.W.2d 639 (1954); Liberty Nat'l Bank v. Buscaglia, 26 App. Div. 2d 97, 270 N.Y.S.2d 871 (1966), *appeal docketed,* No. 203, New York Court of Appeals, April 25, 1967; Northwestern Nat'l Bank v. Gillis, ... S.D. ....., 148 N.W.2d 293 (1967).

cerned with what authority to tax, if any, should be given to the states.[39] It would appear, therefore, that Congress intended that national banks be subjected to state taxation only in the ways which were expressly provided in the statute. Indeed, one commentator has observed that unless the implied immunity of section 548 was a congressional grant of immunity, rather than a constitutional grant of immunity, serious questions arise concerning the constitutional power of Congress to enact section 548.[40]

In 1926, Congress amended section 41 for the purpose of establishing "a taxing parity" between national banks and "other corporations and their shareholders."[41] When the underlying business problems of the instant case are examined,[42] it seems apparent that this purpose is no longer being fulfilled. Thus, if this parity of taxation between national banks and "other corporations generally and their shareholders" (state chartered banks) is to be restored by statute, Congress must further amend section 548.

The court in the instant case has circumvented Congress by removing the implied constitutional immunity of national banks from state taxation, thereby establishing the authority of states to directly tax national banks. Whether this position can be sustained depends on a redefinition of the standard of protection necessary to maintain federal supremacy. Any other approach would result in grave doubts as to whether national banks are still properly created instrumentalities of the federal government. But, even if the constitutional immunity of national banks from state taxation is no longer necessary to preserve the supremacy of the federal sovereign, section 548 may continue to be interpreted as it has been in prior cases and thereby preclude the states from taxing national banks. The better avenue is to directly present Congress with sufficient arguments to persuade that body to amend section 548 to include the state sales and use tax as an acceptable method of state taxation of national banks.

Thomas C. Riley

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39. CONG. GLOBE, 38th Cong., 1st Sess. 1865–66, 1871–74 (1864).

40. *See* Traynor, *National Bank Taxation in California,* 17 CALIF. L. REV. 83, 88 (1929), where the author, on commenting upon the basis of state power to tax national banks, observed:

> It is apparent that the theory that the states derive their power to tax national banks from a grant by Congress cannot be sustained if it means that Congress has granted a power which is by the Constitution delegated exclusively to the federal government or prohibited to the states by that instrument.

41. 67 CONG. REC. 6083 (1926) (remarks of Representative McFadden).

42. *See* Dane, *The New Sales and Use Tax Law,* 51 MASS. L.Q. 239, 247–48 (1966), where the author observes:

> The status of sales to national banks is likely to prove a major bone of contention since national banks and state banks are in direct competition in many areas, particularly in the area of supplying computer and data processing services on a fee basis. If the national banks are entitled to purchase data processing equipment free of any sales tax burden, their competitive position vis-a-vis their state-chartered rivals is greatly enhanced.

CUSTODY DECREES — OUT-OF-STATE DECREE RENDERED WITHOUT PERSONAL SERVICE ON THE MOTHER NOT ENTITLED TO FULL FAITH AND CREDIT.

Batchelor v. Fulcher (Ky. 1967)

Appellee, father of the children in question, obtained a divorce and custody decree in Indiana. The two children were present before the Indiana court, and the appellant mother was proceeded against by publication. During a visit to the father in Indiana a year later, the mother removed the children to Kentucky where she instituted her own custody action, personally serving the father when he came to Kentucky to retake the children. The Circuit Court of Hopkins County dismissed her action without a hearing, treating the Indiana decree as conclusive. On appeal, the Court of Appeals of Kentucky reversed in a five to two decision, *holding* that the full faith and credit clause of the United States Constitution[1] did not bar the circuit court from hearing the case, that the circuit court had jurisdiction over the parties, and that the welfare of the children is the determining factor in the award of custody. *Batchelor v. Fulcher,* 415 S.W. 2d 828 (Ky. 1967).

The applicability of the full faith and credit clause of the United States Constitution was squarely presented when the opinion stated quite clearly that regardless of the validity of the Indiana judgment it should not be enforced in a child custody case.[2] In reaching this conclusion both the majority and the dissent looked to the United States Supreme Court for precedent. Significantly, both chose *May v. Anderson*[3] as the point of departure.

At the time of *May,* the general rule had been that exclusive of fraud or lack of jurisdiction a custody award of one state would be recognized and binding in another state as long as the circumstances which existed at the time of the decree still obtained.[4] In *May,* the mother, living with her husband and children in Wisconsin, took the children to Ohio and decided not to return. The father successfully sued for divorce and custody of the children in Wisconsin, having served the mother personally in Ohio with a copy of the Wisconsin summons and petition in accordance with Wisconsin divorce proceeding requirements. When the father attempted to have the Wisconsin custody decree enforced in Ohio, the

1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.
U.S. CONST. art. IV, § 1.

2. Batchelor v. Fulcher, 415 S.W.2d 828, 829 (Ky. 1967).

3. 345 U.S. 528 (1953).

4. *See, e.g.,* Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933); Wear v. Wear, 130 Kan. 205, 285 P. 606 (1930); Talbot v. Talbot, 120 Mont. 167, 181 P.2d 148 (1947); Mylius v. Cargill, 19 N.M. 278, 142 P. 918 (1914); Kenner v. Kenner, 139 Tenn. 211, 201 S.W. 779 (1918). *See generally* R. LEFLAR, CONFLICT OF LAWS § 180, at 348 (1959); Annot., 9 A.L.R.2d 434, 454 (1950); 49 Nw. U.L. REV. 400 (1954); 47 Nw. U.L. Rev. 544 (1952).

United States Supreme Court held that even if the technical domicile of the children were with the father, the Wisconsin court did not have the requisite personal jurisdiction to deprive the mother of her right to the immediate possession of the children.[5] The decision is extremely ambiguous, however, on a number of bases.

As the dissent in *Batchelor* points out,[6] the majority opinion in *May* is written by Mr. Justice Burton and concurred in by three other justices. Justices Jackson, Reed, and Minton dissented, and Mr. Justice Clark took no part in the case. Therefore, Mr. Justice Frankfurter's separate concurring opinion[7] should be examined to see if it supports the majority's reasoning on the apparent inapplicability of the full faith and credit clause. Mr. Justice Frankfurter saw the majority as deciding that the full faith and credit clause did not require Ohio to recognize the Wiconsin decree. But he did not read the majority opinion, as he thought the minority did, to hold that the due process clause forbade the Ohio court to recognize the Wisconsin decree. The majority, however, decided that a court of a state where the mother is neither domiciled, present, nor resident, may not cut off her right to the custody of her minor children without obtaining in personam jurisdiction over her — ostensibly a due process argument.[8] The majority reached its decision by analogizing the mother's right to the child in a case where she is not present at the custody adjudication to a wife's right to financial support in an ex parte divorce proceeding.[9] In the latter situation the Supreme Court has held that the wife's right to support cannot be cut off, even though the marital bonds may have been severed.[10] The majority's analysis in terms of parental right to the children is very different from Mr. Justice Frankfurter's, since the former seems to involve an element of due process.[11] On the other hand, Mr. Justice Frankfurter's opposition to the recognition of full faith and credit is based on notions of child welfare and the scope of the full faith and credit clause.[12] Had the majority in *May* avoided the property right analogy, the case would be much stronger in terms of full faith and credit, and therefore more compelling in the present situation.

Neither the majority nor the dissent in *Batchelor* cited any Kentucky authority in regard to the full faith and credit issue; however, the attitude of the Kentucky courts is reflected in the recent case of *Brengle v. Hurst*,[13] which appellant felt resolved the issue in her favor.[14] In that case, the mother, subsequent to obtaining an Indiana divorce and custody of the children, moved to Kentucky. The father successfully opened the decree

5. 345 U.S. at 534.
6. 415 S.W.2d at 831.
7. 345 U.S. at 535–36.
8. 345 U.S. at 533.
9. 345 U.S. at 533–34.
10. Kreiger v. Kreiger, 334 U.S. 555 (1948); Estin v. Estin, 334 U.S. 541 (1948).
11. *See* Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?*, 73 YALE L.J. 134, 135 (1963).
12. 345 U.S. at 536.
13. 408 S.W.2d 418 (Ky. 1966).
14. Brief for Appellant at 25, Batchelor v. Batchelor, 415 S.W.2d 828 (Ky. 1967).

in Indiana and was awarded custody of the children. Notice had been sent to the mother in Kentucky, but the suit had been commenced in Indiana without service of process on her or the obtaining of in personam jurisdiction over her. The father then brought a habeas corpus petition in Kentucky to enforce the Indiana custody decree, but was refused. The court, while mentioning changed conditions, welfare of the child, and the mother's good faith residency, revealed the key aspect of its approach:

> The United States Supreme Court has consistently refused to rule categorically that child custody matters are within the purview of the Full Faith and Credit Clause, for that Court appreciates the fact that the welfare of the children is the chief consideration of all of us, and that a rigid application of the Full Faith and Credit Clause often would thwart the achievement of that end.[15]

This decision and other Kentucky cases favored the court in the instant case with a number of optional routes to take if it had chosen to detour a confrontation with the full faith and credit clause in arriving at its ultimate conclusion, that is, that the lower court had jurisdiction to determine custody of the children.

Its first option was to regard the Indiana judgment as void.[16] The appellant gave the court sufficient grounds when she claimed that her ex-husband had lied about his Indiana residency and about knowledge of appellant's whereabouts at the time of the Indiana action.[17] A second option would have been to utilize the changed circumstances doctrine.[18]

15. 408 S.W.2d at 421. In reaching this conclusion the *Brengle* court failed to cite specific decisions of the United States Supreme Court. However, for a discussion of such cases, see pp. 410, 411 & notes 26, 31, 32 *infra*.

16. Although not exact precedents, the Kentucky court had analogously decided: to void a foreign custody decree when the child was not domiciled in the foreign state at the time of the institution of proceedings, except if the child had been removed to frustrate jurisdiction, Rodney v. Adams, 268 S.W.2d 940 (Ky. 1954); to accept an Indiana court's order for a husband's custody of the child where both parents, living with the children, were before the court, in preference to a subsequent order of the same court awarding custody to the mother without notice to the father who had returned to Kentucky, Abbott v. Abbott, 304 Ky. 167, 200 S.W.2d 283 (1947); to invalidate an Indiana custody decree used in a Kentucky court because the child had not been present or domiciled in Indiana at the time, on the ground that the state can act as *parens patriae* only if the person is within the state, Callahan v. Callahan, 296 Ky. 444, 177 S.W.2d 565 (1944).

17. Brief for Appellant at 16–22, Batchelor v. Fulcher, 415 S.W.2d 828 (Ky. 1967).

18. The changed circumstances doctrine has evolved through the widespread practice of limiting the effect of a foreign custody decree by holding that it may be reexamined in light of changes that have occurred since the original award. This doctrine is incorporated in the Restatement of Conflicts, which provides that when such changes are found, a court with jurisdiction may alter the award based upon such new facts as have arisen. RESTATEMENT OF CONFLICT OF LAWS § 147, comment *a* at 212–13 (1934); RESTATEMENT OF CONFLICT OF LAWS § 117, comment *b* at 57 (Tent. Draft No. 1, 1953).

The doctrine has been acknowledged by the Supreme Court. *See* Ford v. Ford, 371 U.S. 187, 191 (1962); Kovacs v. Brewer, 356 U.S. 604, 608 (1958); May v. Anderson, 345 U.S. 528, 532 (1953); New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 613 (1947). *See generally* A. EHRENZWEIG, CONFLICT OF LAWS § 87, at 289–90 (1962); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 352 (1953).

Kentucky, when granting full faith and credit to out of state decrees, has always recognized the changed circumstances limitation. *See* Chamblee v. Chamblee, 248 S.W.2d 422 (Ky. 1952); Frick v. Kaufman, 310 Ky. 829, 222 S.W.2d 185 (1949);

There is no indication of this in the majority opinion,[19] and it hardly can be inferred. A third possible approach would have been to argue that the father had waived his rights to custody by turning the children over to the appellant in the first instance (though this is disputed). Lastly, the court, without voiding the decree, could have employed the equitable doctrine of "unclean hands"[20] by disapproving of the father's alleged reprehensible conduct before the Indiana court, thereby avoiding the full faith and credit issue. Instead, it chose to apply *May* — a case which, at least in its majority opinion, takes a very parental right oriented view toward the problem,[21] while the Kentucky cases traditionally have been child oriented[22] — and apparently requires that the foreign court have both parents and the children in front of it, and that no change of circumstances or inequitable behavior has occurred, before it will grant full faith and credit to a custody decree.

The dissent is correct, however, in factually distinguishing the instant case from *May,* for in the latter the children were not in front of the Wisconsin court as they were before the Indiana court in *Batchelor.* Of course *May* can be read so that this fact is irrelevant to the majority's reasoning if one takes its parental right-due process language literally, but Mr. Justice Frankfurter's concurring opinion is not in these same terms, and his concurrence was necessary to overrule the lower court opinion. At any rate, unless the Kentucky court is changing its orientation toward the problem of custody decrees, *May* would seem less appropriate as support for this decision than would a combination of state precedents from Kentucky and elsewhere. In any event, the effect of this decision is to make full faith and credit a dead letter in the child custody area in Kentucky; however, this conclusion, under the present trend of the law, is one that has been foreseen.[23]

Other state courts have come to substantially the same position even though their approaches have been different. The strongest stand on state reservation of complete power to modify custody decrees is exemplified

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Abbott v. Abbott, 304 Ky. 167, 200 S.W.2d 283 (1947); Callahan v. Callahan, 296 Ky. 444, 177 S.W.2d 565 (1944).

19. 415 S.W.2d at 828–31.

20. In the instant case the court could have found "unclean hands" based on the same facts that it could have employed to find the Indiana judgment void, see p. 408 *supra.*

For specific application of this doctrine in the custody area see GOODRICH, CONFLICT OF LAWS §§ 136, 274 (4th ed. 1964); Ehrenzweig, *Interstate Recognition of Custody Decrees,* 51 MICH. L. REV. 345, 357 (1953). (Note that the doctrine has been renamed in this context, "clean hands.")

The Kentucky court has used the "clean hands" principle most obviously in Shippen v. Bailey, 303 Ky. 10, 196 S.W.2d 425 (1946) and Stafford v. Stafford, 287 Ky. 804, 155 S.W.2d 220 (1941), cases involving fathers who either violated a decree of the foreign court or used insidious tactics to get the case to court in Kentucky.

21. *See* p. 407 *supra.*

22. The Kentucky court has recognized the paramount interest of the child in its custody cases. *See* Brengle v. Hurst, 408 S.W.2d 418 (Ky. 1966); Wells v. Wells, 406 S.W.2d 157 (Ky. 1966); McLemore v. McLemore, 346 S.W.2d 722 (Ky. 1961).

23. *See generally* R. LEFLAR, CONFLICT OF LAWS § 180, at 349–50 (1959); Ehrenzweig, *Interstate Recognition of Custody Decrees,* 51 MICH. L. REV. 345, 373–74 (1953); 53 KY. L.J. 799, 805–06 (1965).

by Kansas and New York, the former's position appearing to be that where the child's welfare is concerned, the state, as *parens patriae*, regards itself as totally unbound by foreign custody decrees.[24] New York similarly states flatly that "[t]he full faith and credit clause does not apply to custody decrees."[25]

Most other states step more gingerly in this briarpatch, but, by employing several notable techniques, all reserve considerable leeway in dealing with foreign custody decrees. One such approach is to carefully limit the effect of the original decree to only that which it would have in the issuing state.[26] The most frequently employed technique, however, is the changed circumstances doctrine,[27] since it is the rare case where such change can not be found.[28] In addition, it is possible to find that the first court lacked jurisdiction to render a valid custody decree.[29] It would seem that Kentucky simply has utilized this latter technique to its maximum, were it not for the court's language that even if the decree were valid it should not be controlling in the present case.[30]

It would be bold to suggest that the Supreme Court has indicated the movement to this very position, but it is another thing to say that the decisions of the Court indicate any other direction for a state court.[31]

> Much current criticism of judicial decisions as unprincipled or unarticulated tends to overlook the useful part played by decisions in

24. The Kansas approach is reflected in the following cases: Moyer v. Moyer, 171 Kan. 495, 233 P.2d 711 (1951); Moloney v. Moloney, 167 Kan. 444, 206 P.2d 1076 (1949); Wear v. Wear, 130 Kan. 205, 285 P. 606 (1930); *In re* Bort, 25 Kan. 308, 37 Am. R. 255 (1881).

25. Bachman v. Mejias, 1 N.Y.2d 575, 580, 136 N.E.2d 866, 868, 154 N.Y.S.2d 903, 907 (1956). *See* Hicks v. Bridges, 2 App. Div. 2d 335, 155 N.Y.S.2d 746 (App. Div. 1956); Abreu v. Abreu, 46 Misc. 2d 942, 261 N.Y.S.2d 687 (Fam. Ct. 1965).

26. New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947). In *Halvey*, when the mother brought a habeas corpus proceeding in New York to obtain the children awarded her by a Florida divorce decree, the United States Supreme Court affirmed the modification of the custody award on the narrow ground that the Florida decree could be modified at all times by the Florida court, and New York, therefore, only had done what Florida could do. *Id.* at 614.

Cases illustrating this approach include: Langan v. Langan, 150 F.2d 979 (D.C. Cir. 1945); Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948); Marlow v. Wene, 240 Cal. App. 2d 670, 49 Cal. Rptr. 881 (1966); State v. Ricketson, 221 La. 691, 60 So. 2d 88 (1952); Taylor v. Taylor, 246 Md. 616, 229 A.2d 131 (1967); *In re* Craigo, 266 N.C. 92, 145 S.E.2d 376 (1965); Cleeland v. Cleeland, 249 N.C. 16, 105 S.E.2d 114 (1958).

27. See note 18 *supra*. *See, e.g.*, Boone v. Boone, 150 F.2d 153 (D.C. Cir. 1945); Marlow v. Wene, 240 Cal. App. 2d 670, 49 Cal. Rptr. 881 (1966); Foster v. Foster, 8 Cal. 2d 719, 68 P.2d 719 (1937); Little v. Franklin, 40 So. 2d 768 (Fla. 1949); Faris v. Faris, 35 Ill. 2d 305, 220 N.E.2d 210 (1966); Weber v. Redding, 200 Ind. 448, 163 N.E. 269 (1928); Taylor v. Taylor, 246 Md. 616, 229 A.2d 131 (1967); Sanders v. Sanders, 223 Mo. App. 834, 14 S.W.2d 458 (1929); *In re* Reed, 152 Neb. 819, 43 N.W.2d 161 (1950); Cleeland v. Cleeland, 249 N.C. 16, 105 S.E.2d 114 (1958).

28. *See, e.g.*, Bernstein v. Bernstein, 80 Cal. App. 2d 921, 183 P.2d 43 (1947); 53 Ky. L.J. 799, 804n.54 (1965).

29. *See, e.g.*, Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521 (1948); Dahlke v. Dahlke, 97 So. 2d 16 (Fla. 1957); Beckmann v. Beckmann, 358 Mo. 1029, 218 S.W.2d 566 (1949); Sanders v. Sanders, 223 Mo. App. 834, 14 S.W.2d 458 (1929); *In re* Reed, 152 Neb. 819, 43 N.W.2d 161 (1950).

30. Batchelor v. Fulcher, 415 S.W.2d 828, 828–29 (Ky. 1967).

31. Supreme Court cases in this area subsequent to *May* are Kovacs v. Brewer, 356 U.S. 604 (1958) and Ford v. Ford, 371 U.S. 187 (1962). In *Kovacs* the Court remanded on facts similar to *Halvey*, see note 26 *supra*, to the North Carolina courts

> the past which were fraught with creative ambiguity, which moved in a certain direction but left open the turns that might be taken.[32]

The Supreme Court has avoided deciding one of these full faith and credit cases directly, and there is little to indicate that it will change its tact in the future. It seems that, similar to certain state courts,[33] the Supreme Court, at least tacitly, has recognized that the area of child custody is unique in the context of the full faith and credit clause, and that judicial respect for the Court will not wane because it does not demand strict obeyance to this clause in this area.[34]

The decision in the instant case has moved Kentucky closer to the position of basing judicial discretion to modify out-of-state custody decrees entirely upon the ability of the court to adequately provide for the child. This approach seems necessary if problems of custody are to be adjudicated in our present court system.[35]

John R. Doubman Jr.

FEDERAL RULES OF CIVIL PROCEDURE — IMPLEADER — WHERE THE UNITED STATES IS BEING SUED BY AN INDIVIDUAL CITIZEN IT CAN IMPLEAD A STATE UNDER RULE 14.

Williams v. United States (S.D.N.Y. 1967)

The plaintiff, a New Jersey seaman, brought a suit in admiralty against the United States in the United States District Court for the Southern District of New York. He alleged injuries caused by the negligence of the United States, its agents, servants, and employees and by the

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for inclusion under the rule stated in *Halvey*, although Mr. Justice Frankfurter in dissent accuses the majority of upholding full faith and credit in the custody area by asking the North Carolina courts to find changed circumstances before modification of the decree. In *Ford*, the issue was again avoided when the Court decided that South Carolina had misinterpreted Virginia law as to the finality of the Virginia order in front of it, thus neatly shoehorning the case under *Halvey*.

32. Freund, *Rationality in Judicial Decisions*, in NOMOS VII: RATIONAL DECISION 109, 118 (C. Friedrich ed. 1964). Possible ramifications of the Court's approach are discussed in Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?*, 73 YALE L.J. 134, 138–50 (1963).

33. *See* Justice Traynor's majority opinion in Sampsell v. Superior Court, 32 Cal. 2d 763, 777–80, 197 P.2d 739, 749–50 (1948), in which he not only indicates the delicate and unique problems of the area, but suggests the acceptance of multiple jurisdiction.

34. *See* Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 831 (1944).

35. There is considerable authority suggesting that the area will need legislative, or at least extrajudicial, remedy before satisfactory results will be achieved. *See* A. EHRENZWEIG, CONFLICT OF LAWS § 87, at 299–300 (1962); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 374 (1953); 53 KY. L.J. 799, 806 (1965).

unseaworthiness of a vessel furnished by the United States to the State of New York for use by the New York State Maritime College as a training ship. The United States claimed a right of indemnity against New York based upon contractual obligations and warranties and thus sought to implead New York pursuant to rule 56 of the Supreme Court Admiralty Rules.[1]

The district court denied New York's motion to dismiss the third-party complaint for lack of jurisdiction over the person,[2] *holding* that neither the wording of rule 14 of the Federal Rules of Civil Procedure, nor section 1345 of the Judicial Code, nor the eleventh amendment to the United States Constitution prevents the United States from impleading a state when sued by a citizen of another state. *Williams v. United States,* 42 F.R.D. 609 (S.D.N.Y. 1967).

Surprisingly, there is only one other case involving this issue, *Parks v. United States,*[3] where on jurisdictional objections substantially identical to those before the instant court, opposite conclusions were reached.[4] In *Williams,* the court specifically dealt with the reasoning in *Parks* and refuted all of the arguments presented therein.

New York's first objection to impleader was that rule 14(a) specifically provides for the service of a third-party complaint "upon a *person* . . . who is or may be liable" to the defendant[5] and that a state is not a "person" within the meaning of the rule.[6] The court in *Parks* had adopted this view, basing its opinion in part on the particularized definition of "person" provided in the United States Code.[7] While in ordinary legal

1. Prior to a hearing on New York's objections to the impleader petition, pursuant to an order of the United States Supreme Court of February 28, 1965, the Rules of Practice in Admiralty and Maritime Cases were merged into the Federal Rules of Civil Procedure. The district court, therefore, considered the petition as if made pursuant to rule 14(a).

2. New York originally filed exceptions to the impleading petition claiming that it was immune under the Federal Constitution, and as a sovereign, and that it "cannot be impleaded as a respondent in this action." 42 F.R.D. 609, 612 (S.D.N.Y. 1967). Following the merger of the Admiralty Rules into the Federal Rules of Civil Procedure, and with the consent of the parties, the court ordered the State's exceptions to be considered as a motion made pursuant to rule 12(b)(2) of the Federal Rules.

3. 241 F. Supp. 297 (N.D.N.Y. 1965), *aff'd on other grounds,* 370 F.2d 92 (2d Cir. 1966).

4. The holding in *Parks* has been criticized by those who have commented upon it. *See* 65 COLUM. L. REV. 1506 (1965); 64 MICH. L. REV. 948 (1966); 13 U.C.L.A. L. REV. 433 (1966).

5. FED. R. CIV. P. 14(a) (emphasis added).

6. The right of the United States, as a defendant, to implead a third-party was not challenged in either the *Williams* or the *Parks* case and has been upheld both under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1964), and the Admiralty Rules. United States v. Yellow Cab Co., 340 U.S. 543, 551–52 (1951) (dictum) (Federal Tort Claims Act); Porto Rico Gas & Coke Co. v. Frank Rullan & Associates, Inc., 189 F.2d 397 (1st Cir. 1951) (Federal Tort Claims Act); Rich v. United States, 177 F.2d 688 (2d Cir. 1949) (Admiralty Rules). *See generally* 1A W. BARRON & A. HOLTZHOFF, FEDERAL PRACTICE AND PROCEDURE § 426.3 (Wright ed. 1960) [hereinafter cited as BARRON]; 3 J. MOORE, FEDERAL PRACTICE ¶ 14.29 (2d ed. 1967) [hereinafter cited as MOORE].

7. 1 U.S.C. § 1 (1964) provides in part:

In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words "person" and "whoever" include corporations,

usage the term "person" is not considered to include a sovereign,[8] courts can and will go beyond the words of a statute to examine its legislative environment, "[t]he purpose, the subject matter, the context [and] the legislative history . . . are aids to construction which may indicate an intent, by the use of the term [person], to bring state or nation within the scope of the law."[9] The court in *Williams* accepted this latter approach, and after examining the purposes of the impleader rule and other applications of it, concluded that the state should be included within its scope.[10]

Clearly the purposes of impleader[11] are equally served, whether the third-party is a state or an individual,[12] but despite the desirability of impleading the state, the question still remains as to whether it is *permitted* under rule 14. The liberal construction to be afforded the rules,[13] combined with the inclusion of the state within the meaning of "person" in other applications,[14] seems to support the conclusion reached in *Williams* that rule 14 permits the impleading of a state. Analogically, one of the strongest reasons for permitting the state to be included within the meaning of "person" is that the Supreme Court has permitted the United States to be impleaded under rule 14,[15] and, while the Court has not always held that both states and the United States must be considered the same in regard to the meaning of "person,"[16] there appears to be no reason in the present application to distinguish between them.

The court's extensive justification for the inclusion of a state within the meaning of rule 14(a) seems quite unnecessary, however, when it is realized that the original claim was initiated under the court's admiralty

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companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. . . .

8. United States v. Cooper Corp., 312 U.S. 600, 604 (1941).

9. *Id.* at 605; *accord,* Sims v. United States, 359 U.S. 108, 112 (1959).

10. 42 F.R.D. at 613–14.

11. The general purpose of Rule 14 is to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant.
3 MOORE ¶ 14.04 at 501, *quoted in* Dery v. Wyer, 265 F.2d 804, 806–07 (2d Cir. 1959).

12. This was admitted in *Parks,* 241 F. Supp. at 299–300.

13. *See* British Transp. Comm'n v. United States, 354 U.S. 129, 136–39 (1957). FED. R. CIV. P. 1 provides in part: "[The rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

14. Sims v. United States, 359 U.S. 108 (1959) (INT. REV. CODE of 1954, § 6332); Georgia v. Evans, 316 U.S. 159 (1942) (Sherman Act § 7, 26 Stat. 210 (1890), now 15 U.S.C. § 15 (1964)).

15. United States v. Yellow Cab Co., 340 U.S. 543 (1951). The Court reasoned that where the United States had consented to be sued in a separate action, it would be unduly technical to hold that the same claim could not be brought by means of a third-party action. *Id.* at 554. The Court did not appear to be concerned with any possible limitation imposed by the use of the word "person" in rule 14. While the Federal Tort Claims Act provides that the United States shall be liable as would a *private person,* 28 U.S.C. § 1346(b) (1964), the Court attached no special significance to the use of the word "person" in rule 14.

16. *Compare* United States v. Cooper Corp., 312 U.S. 600 (1941) (United States *is not* a "person" within the meaning of Sherman Act § 7) *with* Georgia v. Evans, 316 U.S. 159 (1942) (State Is a "person" within the meaning of Sherman Act § 7).

jurisdiction,[17] so that the court should have considered the impleader petition pursuant to rule 14(c).[18] The importance of this distinction is that while rule 14(c)[19] was intended only to carry forward certain special admiralty features[20] of admiralty rule 56,[21] the phrase "person (individual or corporation)" in rule 56 was changed to "third-party defendant" in new rule 14(c).[22] Since the Advisory Committee on the Rules of Civil Procedure makes no mention of this change,[23] it can be argued that the term "person," as used in rule 14(a) and admiralty rule 56, was never intended to be any more restrictive than the general term "third-party defendant," as used in rule 14(c).

A second jurisdictional objection raised in *Williams* was that the petition for impleader did not come within the district court's "original jurisdiction of all civil actions, suits or proceedings commenced by the United States,"[24] since the original action was not *commenced* by the United States. The court concluded, without extensive analysis, that the mere dependency of the United States' claim upon the plaintiff's claim should not "divest the United States' claim of justiciability,"[25] especially where there was no historical basis for inferring that Congress intended to exclude third-party proceedings from section 1345.[26] On the other hand, while recognizing that the district courts have jurisdiction over suits by the United States against a state, regardless of the controversy, the court in *Parks* felt that the impleader petition did not constitute an "action commenced by the United States" within section 1345.[27] Neither court, however, fully examined the wording of section 1345, which provides original jurisdiction not only in civil actions, but also in "*suits* or *proceedings* commenced by the United States."[28] Cases construing the

17. 42 F.R.D. at 612.

18. FED. R. CIV. P. 14(c) provides in part:
When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a *third-party defendant* who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff. . . . (emphasis added).

19. Rule 14(c) was added to the Federal Rules of Civil Procedure in 1966 as part of the merger of the Admiralty Rules into the Rules of Civil Procedure.

20. See FED. R. CIV. P. 14(c) Advisory Committee's Note, 39 F.R.D. 69, 81 (1966), for a description of the special features of admiralty impleader.

21. Admiralty Rule 56 provided in part:
[T]he claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent. . . .

22. See note 18 *supra.*

23. *See* note 20 *supra.*

24. 28 U.S.C. § 1345 (1964).

25. 42 F.R.D. at 614.

26. *Id.*

27. 241 F. Supp. 297, 298-99 (1965). For support for the position that the district courts have jurisdiction over all judicial controversies between the United States and a state *see* United States v. California, 328 F.2d 729 (9th Cir.), *cert. denied,* 379 U.S. 817 (1964).

28. 28 U.S.C. § 1345 (1964) (emphasis added).

meanings of "suit"[29] and "proceeding"[30] have given these terms meanings broad enough to include impleader.

Another basis for jurisdiction suggested, but not discussed, by the court in *Williams* is the doctrine of ancillary jurisdiction. It is generally accepted that no independent grounds are needed for jurisdiction over a third-party claim since the defendant's claim that a third-party is liable to him for all or part of the plaintiff's claim is regarded as ancillary to the original claim.[31] Even under the stricter admiralty rule,[32] the only requirement for jurisdiction was that "[T]here must be at least federal (and possibly also admiralty) jurisdiction over the third-party claim. . . ."[33] Where, as in the *Williams* or the *Parks* cases, the court would clearly have jurisdiction over the United States' claim if brought as a separate action,[34] there is no justification for suggesting that this same claim could not be brought as a third-party proceeding.[35]

The most serious objection to the impleader motion discussed in *Williams* is founded upon the sovereign immunity of the states provision in the eleventh amendment to the United States Constitution: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ."[36] Based on its view that the eleventh amendment, "protects the sanctity of state sovereignty against even being compelled to *appear* defensively in *any* suit *prosecuted* by [an] . . . individual being heard in any federal court,"[37] New York contended that the "net effect of impleading the State of New York would be to make the State subject to an admiralty suit by an individual."[38] As pointed out by the court in *Williams*,[39] New York's view is inconsistent with Chief Justice Marshall's interpretation of the eleventh amendment in *Cohens v. Virginia*:

> What is a suit? We understand it to be prosecution or pursuit of some claim, demand or request. . . .
>
> To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit, is, accord-

29. *See* note 40 *infra.*

30. Beers v. Haughton, 34 U.S. (9 Pet.) 329, 368 (1835); Statter v. United States, 66 F.2d 819, 822 (9th Cir. 1933).

31. *See, e.g.,* Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); United States v. Acord, 209 F.2d 709 (10th Cir.), *cert. denied,* 347 U.S. 975 (1954); Sheppard v. Atlantic States Gas Co., 167 F.2d 841 (3d Cir. 1948). *See generally* 1A BARRON § 424; 3 MOORE ¶¶ 14.25–.26; Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts,* 33 F.R.D. 27, 38–39 (1964).

32. *See generally* 3 MOORE ¶ 14.20.

33. *Id.* at 669.

It has been held that an indemnity agreement relating to maritime activities, as alleged in the *Williams* case, is within the admiralty jurisdiction of the court. American Stevedores, Inc. v. Porello, 330 U.S. 446, 456 (1947).

34. *See* note 27 *supra.*

35. *Cf.* United States v. Yellow Cab Co., 340 U.S. 543, 554 (1951).

36. U.S. CONST. amend. XI.

37. 42 F.R.D. at 615.

38. *Id.* at 615–16.

39. *Id.* at 616.

> ing to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of a court. . . .[40]

In *Ex Parte New York*,[41] the Supreme Court ruled that admiralty jurisdiction is also within the prohibition of the eleventh amendment. Applying the above criteria to the situation in *Williams* it can be seen that the plaintiff is in fact "demanding" nothing from New York. While the original plaintiff could also assert a claim against the third-party defendant under rule 14,[42] independent jurisdiction would be needed to support such a claim.[43] Realizing that the primary historical purpose of sovereign immunity, and in particular the eleventh amendment, was to protect the states from liability,[44] it is easy to discern that impleader does not violate this purpose since the state is exposed to no liability vis-à-vis the plaintiff.

The sovereign immunity and the eleventh amendment argument becomes even less compelling upon an examination of the other instances where a defendant has been permitted to implead a third-party whom the original plaintiff could not sue directly.[45] Professor Moore, in discussing this area, points out that "[n]o legal relationship between the plaintiff and the third-party defendant need be shown, and it is irrelevant to the defendant's right to bring in a third party claimed to be liable over to the defendant, that the *plaintiff* has no claim against the third party. . . ."[46]

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40. 19 U.S. (6 Wheat.) 264, 407–08 (1821).

41. 256 U.S. 490 (1921).

42. FED. R. CIV. P. 14(a) provides in part:
The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. . . .

43. McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960); 3 MOORE ¶ 14.27[1].

44. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406–07 (1821). *See generally* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

45. Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963) (direct employee–employer suit barred by compensation act but third-party liability based on admiralty rule of contribution); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) (direct employee–employer suit barred by compensation act but third-party liability based on separate agreement); Drake v. Treadwell Constr. Co., 299 F.2d 789 (3d Cir. 1962), *vacated & remanded per curiam*, 372 U.S. 772 (1963) (federal government immune from direct suit by employee but can be impleaded by third-party plaintiff for contribution); Keleket X-Ray Corp. v. United States, 275 F.2d 167 (D.C. Cir. 1960) (suit by plaintiff against third-party barred by statute of limitations, but defendant allowed to implead); Henry Fuel Co. v. Whitebread, 236 F.2d 742 (D.C. Cir. 1956) (a covenant by plaintiff not to sue third-party does not prevent his being impleaded); Hart v. Simons, 223 F. Supp. 109 (E.D. Pa. 1963) (direct employee–employer suit barred by compensation act but employer could still be impleaded). *But see* Busey v. Washington, 225 F. Supp. 416 (D.D.C. 1964).

46. 3 Moore ¶ 14.10 at 555.

The theory of consent was also suggested, but not discussed, by the court in *Williams* as a means of overcoming the eleventh amendment objections.[47] While the Supreme Court has stated that "[t]he conclusion that there has been a waiver of immunity will not be lightly inferred,"[48] the Court has found implied waiver in a situation where a state engaged in the operation of a railroad after Congress made every railroad liable to suit.[49] Following this reasoning, the alleged agreement by New York to indemnify the United States could be considered an implied waiver to whatever immunity to impleader that might have existed. Considering that the very basis of impleader is the indemnity agreement, express or implied-in-law,[50] New York should have been fully aware that, on the basis of that agreement, it would be impleaded into suits initiated by individuals against the United States.[51]

If the United States were not permitted to implead New York because of the eleventh amendment, a secondary question concerning the applicability of the "vouching-in" doctrine would arise. Under this concept, an indemnitor who is given reasonable notice of a claim against his indemnitee, and is given an opportunity to participate in the defense, will be considered bound by a valid judgment, as to the existence and extent of the indemnitee's liability, regardless of whether he actually participated in the suit.[52] While the "vouching-in" doctrine would not directly compel New York to enter the suit as impleader would, it would effectively force New York to intervene to protect its interests. This approach would also raise the issue of immunity under the eleventh amendment.[53]

Both of the jurisdictional objections to impleader could be answered by substituting more succinct language, since no substantive rights are involved in these objections. Rule 14(a) could be amended to conform with the language in rule 14(c),[54] and the Judicial Code could be amended to specifically grant the district courts jurisdiction over impleader actions by the United States against a state.[55] Finally, by rejecting *Parks'* approach to the eleventh amendment objection to impleader, an approach that would protect the state from impleader but not from direct suit by the United States, the *Williams* court has eliminated the possibility of multiple litigation and inconsistent results — the very type of circuity and ineffectiveness the rules were designed to prevent.

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47. 42 F.R.D. at 616.
48. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959); *accord*, Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).
49. Parden v. Terminal Ry., 377 U.S. 184 (1964).
50. 3 MOORE ¶ 14.03[1] at 432.
51. *See* 65 COLUM. L. REV. 1506, 1509 (1965).
52. RESTATEMENT OF JUDGMENTS §§ 107, 108 (1942); *see* Washington Gaslight Co. v. District of Columbia, 161 U.S. 316 (1896); 1B MOORE ¶ 0.405[9]; 3 MOORE ¶ 14.02.
53. *See* 65 COLUM. L. REV. 1506, 1509 (1965); 64 MICH. L. REV. 948, 952 n.26 (1966); 13 U.C.L.A.L. REV. 433, 445 (1966).
54. *See* note 18 *supra*.
55. *See* note 27 *supra*.

HUSBAND AND WIFE — LOSS OF CONSORTIUM — BOTH SPOUSES MUST JOIN IN THE ACTION AND THE ACTION MUST BE JOINED WITH THE INDIVIDUAL'S ACTION FOR PHYSICAL INJURY.

Deems v. Western Md. Ry. (Md. 1967)

Plaintiff brought an action against defendants for the loss of the consortium of her husband. Prior to this suit, plaintiff's husband had settled his claim for personal injuries with the same defendants. Defendants demurred to this action on the ground that under Maryland law a wife has no cause of action for loss of consortium caused by the negligence of a third party. The Superior Court of Baltimore sustained the demurrers and on appeal the Maryland Court of Appeals, avoiding plaintiff's claim that denial of the wife's action would violate the equal protection clause of the fourteenth amendment,[1] affirmed, *holding* that neither husband nor wife may sue for loss of consortium in a negligence action as individuals. Instead, they must sue in a joint action for injury to the marital entity and such suit must be joined with the individual action for physical injury.[2] *Deems v. Western Md. Ry.*, ... Md. ....., 231 A.2d 514 (1967).

The common law recognized an action for loss of consortium by a husband against a negligent tortfeasor who had injured the husband's wife thereby depriving him of his wife's services, society, and sexual relations.[3] Loss of services was a requirement for the cause of action at the common law, with the right to damages for the other aspects being dependent upon showing such loss.[4] Recognizing the loss of services as the required element of the cause of action, the common law refused to allow wives to sue for loss of consortium where their husbands had been negligently injured. This rule was based on the common law theory that women were not entitled to the services of their husbands.[5] Gradually, the requirement of loss of services to the husband was ignored by the courts,[6] and soon after the Married Women's Acts[7] were passed, a wife

1. Recent cases finding such discrimination to be unconstitutional include: Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966); Clem v. Brown, 3 Ohio Misc. 167, 207 N.E.2d 398 (C.P. Paulding County 1965). *Contra,* Krohn v. Richardson Merrell, Inc., ... Tenn. App. ....., 406 S.W.2d 166 (1966), *cert. denied,* 386 U.S. 970 (1967).

2. Since plaintiff's husband had already settled his claim, she was barred from recovery.

3. F. HARPER & F. JAMES, THE LAW OF TORTS 635 (1956); W. PROSSER, THE LAW OF TORTS 903 (3d ed. 1964). Four states allowed neither party to maintain this cause of action. Marri v. Stamford St. R.R., 84 Conn. 9, 78 A. 582 (1911); Bolger v. Boston Elevated Ry., 205 Mass. 420, 91 N.E. 389 (1910); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); Martin v. United Elec. Ry., 71 R.I. 137, 42 A.2d 897 (1945).

4. F. HARPER & F. JAMES, *supra* note 3, at 638.

5. Lynch v. Knight, 11 Eng. Rep. 854 (H.L. 1861); W. PROSSER, *supra* note 3, at 903, 916; RESTATEMENT OF TORTS § 695 (1938); 31 TEMP. L.Q. 284 (1958).

6. *See* Tomme v. Pullman Co., 207 Ala. 511, 93 So. 462 (1922); Aderhold v. Stewart, 172 Okla. 77, 46 P.2d 346 (1935).

"[T]he chief importance of loss of services today appears to be that the plaintiff must show that he is the person who would be entitled to such services."

was permitted to recover, even without a showing of loss of services, where there was an intentional injury to her husband.[8] Finally, in 1950, the Court of Appeals for the District of Columbia Circuit permitted recovery in *Hitaffer v. Argonne Co.*,[9] rejecting the common law reasoning as a basis for denying women the right to damages for loss of consortium where a husband had been injured by a negligent tortfeasor.

After *Hitaffer,* the large majority of scholars and writers favored recovery,[10] but most of the courts rejected the new view.[11] However, "[a]round 1958 something of a current of support for the Hitaffer case set in, and since that date the trend has been definitely in the direction of approval."[12] To date, fifteen states[13] and the District of Columbia[14] allow the wife's recovery. Of these sixteen jurisdictions, three require joinder with the husband's action for physical injury.[15]

The court in the instant case was faced with the question of the constitutionality of depriving a wife recovery for a tort, which, if it were committed against her husband, would have been the basis of damages. At first blush, it appears that the main reason for the ultimate decision in the case at bar was to avoid a conflict with the Constitution;[16] how-

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W. PROSSER, *supra* note 3, at 913. *Contra,* Shields v. Yonge, 15 Ga. 349 (1854); Whitaker v. Warren, 60 N.H. 20 (1880).

7. *See, e.g.,* ILL. ANN. STAT. ch. 68, § 1 (Smith-Hurd 1963); Mo. REV. STAT. § 451.290 (1959).

8. *See, e.g.,* Bird v. Ellingsworth, 156 Or. 103, 65 P.2d 674 (1937); Kauchner v. Mumie, 398 Pa. 13, 156 A.2d 537 (1959); Morey v. Keller, 77 S.D. 49, 85 N.W.2d 57 (1957); *see* W. PROSSER, *supra* note 3, at 903–04.

9. 183 F.2d 811 (D.C. Cir.), *cert. denied,* 340 U.S. 852 (1950).

10. *See* F. HARPER & F. JAMES, *supra* note 3, at 640–43; W. PROSSER, *supra* note 3, at 917; 48 CALIF. L. REV. 882 (1960); 50 KENT. L.J. 263 (1961); 26 MD. L. REV. 361 (1966); 10 S.D.L. REV. 120 (1965); 10 ST. LOUIS U.L.J. 276 (1965); 5 WASHBURN L.J. 112 (1965); 18 W. RES. L. REV. 621 (1967). *But see* Jaffe, *Damages for Personal Injury: The Impact of Insurance,* 18 LAW & CONTEMP. PROB. 219 (1953); Thurman, *Recovery by Wife for Loss of Consortium of the Husband,* 24 INS. COUNSEL J. 224 (1957).

11. *See, e.g.,* Deshotel v. Atchison, T. & S.F. Ry., 50 Cal. 2d 664, 328 P.2d 449 (1958); Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960); W. PROSSER, *supra* note 3, at 918.

12. W. PROSSER, *supra* note 3, at 918.

13. Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D. Mont. 1961); Cooney v. Mooman, 109 F. Supp. 448 (D. Neb. 1953); Missouri Pac. Transp. Co. v. Miller, 277 Ark. 351, 299 S.W.2d 41 (1957); Yonner v. Adams, 53 Del. 229, 167 A.2d 717 (1961); Brown v. Georgia-Tennessee Coaches, 88 Ga. App. 519, 77 S.E.2d 24 (Ct. App. 1953); Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956); Deems v. Western Md. Ry., ___ Md. ___, 231 A.2d 514 (1967); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Shepherd v. Consumers Cooperative Ass'n, 384 S.W.2d 635 (Mo. 1964); Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965); Clem v. Brown, 3 Ohio Misc. 67, 207 N.E.2d 398 (C.P. Paulding County 1965); Ross v. Cuthbert, 239 Or. 429, 397 P.2d 529 (1946); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959); Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

14. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), *cert. denied,* 340 U.S. 852 (1950).

15. Deems v. Western Md. Ry., ___ Md. ___, 231 A.2d 514 (1967); Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965); Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

16. Oppenheimer, J., writing for the court, acknowledges that it was one of the reasons for the court's opinion. Deems v. Western Md. Ry., ___ Md. ___, 231 A.2d 514, 524 (1967).

ever, if this were so, the court could have chosen to change its common law in one of three ways: allow either spouse to bring the action without a joinder requirement,[17] allow either spouse to bring the action, with the stipulation that it be joined procedurally with the personal injury action, or do away with the cause of action altogether. Instead, the approach taken was to examine what the cause of action for loss of consortium sought to remedy, and on this basis decide who, if anyone, should be allowed to recover.[18]

Cognizance was first taken of the real meaning of loss of consortium, the court establishing that it was "the loss of society, affection, assistance and conjugal fellowship."[19] In taking this first step, the *Deems* court merely reiterated what other courts which had allowed the wife to recover had concluded. However, while earlier courts stopped at stating that women were also entitled to damages because they too were injured by loss of consortium and had a right to protection, the Maryland court sought a more substantial and fundamental legal theory as the basis for its decision. To find this theory, it went to the postulate behind the cause of action, that is, it examined the cause of action without considering whether one or both spouses should be entitled to damages.[20] It was concluded that the tort was built on a foundation of "a right to recover for an injury to the marital entity."[21] With this established, the court proceeded to treat the action as one of first impression.[22]

Focus was then turned to the injured party, the marital entity, and it was noted that this entity is recognized by the law in other contexts.[23] From this point of departure, the court merely extended the concept of man and wife as one entity "to permit recovery for wrongs negligently caused to the *legal unity* through the physical injury of either spouse,"[24] and required the action to be brought by both parties, in a joint action.

This theory defeats all the reasons put forth in denying women the right to damages for loss of consortium. It recognizes that loss of services is a fiction and disregards it as a requirement for either the husband or the wife. It solves the problem of a possible double recovery by recognizing that just a single wrong has been committed, that is, an injury to the marital relationship, and thus only one recovery is justified. Therefore, the physically injured spouse would be barred from claiming damages compensated for under the joint claim. A further safeguard against

17. The fifteen jurisdictions which recognized the wife's cause of action allowed each spouse to recover as individuals.

18. ____ Md. at ____, 231 A.2d at 520–21.

19. *Id.* at ____, 231 A.2d at 517.

20. *Id.* at ____, 231 A.2d at 521.

21. *Id.*

22. *Id.* at ____, 231 A.2d at 524.

23. Columbian Carbon Co. v. Kight, 207 Md. 203, 114 A.2d 28 (1955) (husband and wife may be tenants by the entireties).

24. ____ Md. at ____, 231 A.2d at 521 (emphasis added).

double recovery is the requirement that both actions be brought at the same time.

The analysis employed by the *Deems* court also responds to the claim of women that men and women have received unequal treatment before the courts. Neither spouse has any advantage, but rather each spouse's ability to sue is dependent upon joinder with the other. "They are treated in legal contemplation as the partners they are in fact."[25]

While this approach is unique and logically sound, the results, at best, will only equal those found in jurisdictions allowing both spouses to recover in individual actions. All the jurisdictions which allow the wife to recover recognize that loss of services is not required. Double recovery is avoided in those jurisdictions by instructions to the jury[26] limiting the uninjured spouse's recovery to his independent loss of consortium. Finally the equal protection afforded by this decision is in practice no greater protection than that found in the other jurisdictions.[27]

While this court's approach is theoretically sound in that it recognizes the tort for what it should be in theory,[28] when the practical ramifications of the decision are evaluated it does not take the rights of the parties any further than *Hitaffer*. To the contrary, it could lead to a loss of rights. For example, suppose the injury to the spouse caused him to become extremely irritable, thereby destroying the marriage, and the injured spouse refused to join in a claim with the other spouse. Here, clearly the entity which the court seeks to protect has been injured, but under the court's ruling, no relief will be in the offing. The court could not compel the injured spouse to bring an action which he or she did not wish to bring.[29] The court itself hinted at another shortcoming of this approach.[30] Suppose a spouse's employer was the negligent tortfeasor, and

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25. *Id.*

26. *E.g.*, Moran v. Quality Aluminum Casting Co., 34 Wis. 2d 542, 150 N.W.2d 137 (1967).

27. Other courts have assured the wife equal protection by maintaining the husband's ability to bring suit and simply elevating the wife to the same plane, thereby granting both the same capacity to sue. The *Deems* court achieves equal protection by elevating the wife's right to sue while compromising the husband's traditional ability to bring suit, for both parties are required to join in the suit before it will be allowed. Under either approach, the spouses stand on the same plane *inter se*, albeit different planes.

28. The court cites the following writings as favoring this theory: Foster, *Relational Interests of the Family*, 1962 ILL. L. FORUM 493; Fridman, *Consortium as an 'Interest' in the Law of Torts*, 32 CANADIAN BAR REV. 1065 (1954); Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934); 61 COLUM. L. REV. 1341 (1961); 29 N.C.L. REV. 178 (1951); 25 TUL. L. REV. 293 (1951); 5 WASHBURN L.J. 112 (1965). However, a close analysis of these materials would indicate that none of these commentors would favor this court's approach over an approach that would allow each spouse to recover for loss of consortium where his or her partner has been negligently injured. It would seem that the court has read more into the articles than was contained therein.

29. Judge Friendly, in Igneri v. Cie de Transports Oceaniques, 323 F.2d 257, 264 (2d Cir. 1963), expresses doubt that even a procedural joinder can be compelled.

30. We do not decide the effect which any federal statute, such as the Federal Employers' Liability Act, may have in foreclosing any claim for consortium under the Maryland law in cases where such a statute is applicable. ___ Md. at ___, 231 A.2d 514 at 525.

was statutorily immune from suit by an employee. If the jurisdiction adopted *Deems'* approach, the marriage entity would be left without a remedy due to the lack of standing of one spouse. Granting the soundness of recognizing the marriage as a legal entity, it is the individuals in the marriage, and not the legal concept, who are injured, and it is the individuals who should be given the protection of the law.

George John Cappiello, Jr.

LABOR LAW — REMEDIES — NATIONAL LABOR RELATIONS BOARD ORDER REQUIRING EMPLOYER TO READ UNFAIR LABOR PRACTICE NOTICE TO EMPLOYEES REJECTED AS INAPPROPRIATE TO ACCOMPLISH DISSEMINATION OF INFORMATION CONCERNING EMPLOYEES' RIGHTS.

IUE v. NLRB (D.C. Cir. 1967)

The International Union of Electrical Workers brought charges against Scott's, Inc., alleging that during the union's attempt to organize company employees, corporate officials engaged in extensive violations of sections 8(a)(1), (2), and (3) of the National Labor Relations Act.[1] These violations included the interrogation of employees concerning their interest in the union, threats of loss of jobs and existing benefits, coercion of employees to resist the union, promises of benefits if the union were rejected, anti-union speeches, and the discriminatory discharge of union sympathizers.

The National Labor Relations Board, after reviewing the trial examiner's findings, issued a cease and desist order, and ordered the reinstatement with back pay of the discharged employees. Other remedies included ordering the employer to: mail to each employee notice of his statutory right to be free from coercion, interference, and restraint; post copies of this same notice; allow the union one hour of company time to present its position; and read the notice at a meeting of the employees to be held during working hours.[2]

On appeal to the United States Court of Appeals for the District of Columbia Circuit,[3] the court affirmed the Board's order, except for the provision compelling the employer to read the cease and desist order

1. It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (2) to dominate or interfere with the formation or administration of any labor organization . . . (3) by discrimination in regard to hire or tenure of employment. . . .
29 U.S.C. §§ 158(a)(1)-(3) (1964).

2. Scott's, Inc., 62 L.R.R.M. 1543 (1966).

3. The National Labor Relations Act, section 10(f), 29 U.S.C. § 160(f) (1964), states that "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals. . . ."

to the employees, *holding* that such a provision is inappropriate to achieve the sought after goal of dissemination of information concerning employees' rights, and is, moreover, humiliating and degrading to the employer. *IUE v. NLRB,* 66 L.R.R.M. 2081 (D.C. Cir. September 6, 1967).

Section 10(c) of the National Labor Relations Act allows the National Labor Relations Board wide discretion in ordering a party found guilty of committing unfair labor practices to take such affirmative action as will effectuate the policies of the Act.[4] The courts have recognized that "the relation of remedy to policy is peculiarly a matter for administrative competence,"[5] and is to be ascertained by the Board in the exercise of its presumed expertise[6] in the labor area. The Board can thus adapt its remedies to fit the needs of the particular situation[7] in its attempt to restore the conditions and relationships that would have existed had there been no unfair labor practice.[8]

In formulating remedies, the Board has attempted on occasion to go beyond the usual combination of cease and desist orders and reinstatement with or without back pay in cases where it feels it is dealing with "massive and flagrant" unfair labor practices.[9] When reviewed by the

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4. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as well effectuate the policies of this subchapter. . . .
29 U.S.C. § 160(c) (1964).

5. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); *accord,* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 216 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953); J. P. Stevens & Co. v. NLRB, 380 F.2d 292, 303 (2d Cir.), *cert. denied,* 36 U.S.L.W. 3237 (U.S. Dec. 12, 1967) (No. 684).

6. *See, e.g.,* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 216 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 349 (1953).

7. Local 60, Carpenters v. NLRB, 365 U.S. 651, 655 (1961); NLRB v. District 50, United Mine Workers, 355 U.S. 453, 458 (1958); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 348 (1938).

8. Local 60, Carpenters v. NLRB, 365 U.S. 651, 657 (1961); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938); J. P. Stevens & Co. v. NLRB, 380 F.2d 292, 303, 305 (2d Cir. 1967); Local 57, Int'l Ladies' Garment Workers' v. NLRB, 374 F.2d 295, 300 (D.C. Cir.), *cert. denied,* 387 U.S. 942 (1967).

9. 1 LAB. REL. REP., 66 Analysis 7 (September 11, 1967). One such attempt has taken the form of requiring the employer to post the unfair labor practice notice in the plant. *See, e.g.,* IUE v. NLRB, 66 L.R.R.M. 2081 (D.C. Cir. September 6, 1967); J. P. Stevens & Co. v. NLRB, 380 F.2d 292 (2d Cir. 1967); NLRB v. H. W. Elson Bottling Co., 379 F.2d 223 (6th Cir. 1967). Another Board remedy has been to make the plant facilities available to the union for speech making purposes. This was accepted by the court in IUE v. NLRB, *supra,* but was rejected in NLRB v. H. W. Elson Bottling Co., *supra.* Another Board remedy has been to require the employer to mail copies of the unfair labor practice notice to all the employees. *See, e.g.,* IUE v. NLRB, *supra;* J. P. Stevens & Co. v. NLRB, *supra;* NLRB v. H. W. Elson Bottling Co., *supra.* Still another remedy has been to grant the union access to plant bulletin boards for a specified period. This remedy was approved in NLRB v. H. W. Elson Bottling Co., *supra,* but was rejected in J. P. Stevens & Co. v. NLRB, *supra.* Another remedy has been to require the employer to read the unfair labor practice notice to all the employees on company time. Jackson Tile Mfg. Co. v. NLRB, 272 F.2d 181 (5th

courts of appeal, these attempts have met with varied success.[10] Though this inconsistency in result is attributable in some respects to the different factual situations involved, it is more often the result of different courts applying different standards of review, and, at times, the same court applying different standards from case to case.

The National Labor Relations Act, section 10(e), provides that the reviewing court has the power "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board,"[11] but it is silent as to the criteria to be employed in exercising this power of review. In light of the discretion allowed the Board in fashioning remedies under section 10(c),[12] it might be presumed that the reviewing court is to determine merely whether the Board's order does, in fact, effectuate the policies of the Act. However, the courts have not limited themselves to this standard in reviewing Board orders.

One standard demands that the court enforce the Board order "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act,"[13] while other standards allow the court to reject the remedy as punitive,[14] oppressive,[15] or inappropriate.[16] However, despite this multiplicity of standards,

> [t]he principles which guide appellate courts in reviewing questions of law and fact are plainly of a very general nature leaving much

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Cir. 1959). However, in IUE v. NLRB, *supra,* and NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859 (5th Cir. 1966), such a remedy was rejected. In J. P. Stevens & Co. v. NLRB, *supra,* the Board remedy was modified to allow the employer the option of having a Board representative read the notice.

10. Cases cited note 9 *supra;* Note, *The Need For Creative Orders Under Section 10(c) of The National Labor Relations Act,* 112 U. PA. L. REV. 69, 90–91 (1963).

11. 29 U.S.C. § 160(e) (1964).

12. *See* note 4 *supra.*

13. Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943); *accord,* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 216 (1964); Local 57, Int'l Ladies' Garment Workers' v. NLRB, 374 F.2d 295, 300 (D.C. Cir.), *cert. denied,* 387 U.S. 942 (1967).

14. [T]his authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235–36 (1938). *Accord,* Local 60, Carpenters v. NLRB, 365 U.S. 651, 655 (1961); Republic Steel Corp. v. NLRB, 311 U.S. 7, 11–12 (1940); Local 57, Int'l Ladies' Garment Workers' v. NLRB, 374 F.2d 295, 300 (D.C. Cir.), *cert. denied,* 387 U.S. 942 (1967); NLRB v. Local 85, Sheet Metal Workers', 274 F.2d 344, 347 (5th Cir. 1960).

15. The Board cannot apply "a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953). *Accord,* NLRB v. District 50, United Mine Workers', 355 U.S. 453, 458 (1958).

16. *See, e.g.,* NLRB v. District 50, United Mine Workers', 355 U.S. 453, 458 (1958); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953); IUE v. NLRB, 66 L.R.R.M. 2081 (D.C. Cir. September 6, 1967); J. P. Stevens & Co. v. NLRB, 380 F.2d 292, 304 (2d Cir. 1967); Local 57, Int'l Ladies' Garment Workers' v. NLRB, 374 F.2d 295, 300 (D.C. Cir.), *cert. denied,* 387 U.S. 942 (1967).

> to the discretion of the judges involved. . . . [The principles] should be taken as providing only the most general indication of the nature of review to be accorded by any given court in a particular case.[17]

In his dissent in *IUE*, Judge Wright expressed the feeling that the Board order in question was not a "patent attempt" to achieve inappropriate ends, and thus, should be enforced.[18] The "patent attempt" test allows for little judicial review of a Board order, and to overturn an order solely on this basis almost requires the reviewing court to question the integrity of the Board's intentions.[19] Therefore, not surprisingly, the application of this test seems to be limited to cases where a reviewing court has upheld a Board order,[20] or where a dissenting judge has argued against the rejection of a Board order,[21] or at the most, where the reviewing court rejecting the Board order has used it in conjunction with other, more practical tests.[22]

While the Board order under consideration in *IUE* quite probably was not a "patent attempt," the majority did not feel restricted solely to that standard for in invalidating the order it cited an earlier District of Columbia Court of Appeals case[23] which recognized the "patent attempt" test, but which also characterized the Board order then under review as inappropriate, punitive in nature, and as "not effectuat[ing] a policy of the Act."[24] The application of these latter tests is crucial, for if the majority in *IUE* had restricted itself to the use of the "patent attempt" test, its rejection of the Board order would not have been justified. On such an important point, the court's lack of treatment is regrettable.

If the purpose of requiring the employer to read the notice is to disseminate information to the employees concerning their rights, the order appears to be clearly inappropriate, as the majority claims.[25] The employer is already required, by virtue of the other remedies of the Board which the court has approved, to post the unfair labor practice notice and to

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17. A. COX & D. C. BOK, CASES AND MATERIALS ON LABOR LAW 168 (6th ed. 1965). *See generally* Note, *The Need For Creative Orders Under Section 10(c) of The National Labor Relations Act, supra* note 10, at 92–94; 19 VAND. L. REV. 512, 513–14 (1966).

18. 66 L.R.R.M. at 2083.

19. *Cf.*, Note, *The Need For Creative Orders Under Section 10(c) of The National Labor Relations Act, supra* note 10, at 92.

20. *See* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943); NLRB v. Broderick Wood Prod.. Co., 261 F.2d 548 (10th Cir. 1958).

21. *See, e.g.*, Local 60, Carpenters v. NLRB, 365 U.S. 651 (1961) (dissenting opinion); IUE v. NLRB, 66 L.R.R.M. 2081, 2083 (D.C. Cir. September 6, 1967) (dissenting opinion).

22. *See, e.g.*, Local 57, Int'l Ladies' Garment Workers' v. NLRB, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967); Morrison-Knudsen Co. v. NLRB, 275 F.2d 914 (2d Cir. 1960).

23. Local 57, Int'l Ladies' Garment Workers' v. NLRB, 374 F.2d 295 (D.C. Cir.), *cert. denieed*, 387 U.S. 942 (1967).

24. *Id.* at 300.

25. "We reject this [remedy] as being inappropriate to achieve the sought-after goal of dissemination of information concerning employees' rights." IUE v. NLRB, 66 L.R.R.M. at 2082.

mail copies of it to all the employees, and to allow the union access to the employees, during working hours, in order to present its position. It is doubtful that the reading by the employer will disseminate any information that the employees have not already obtained through these other remedies. The order becomes all the more inappropriate when combined with the fact that it would be "humiliating and degrading to the employer and undoubtedly would have a lingering effect on future relations between the company and the Union,"[26] by helping to solidify the anti-union sentiment of the company. Such a result would conflict with the avowed purpose of the NLRA to foster amicable relations between the two parties.[27]

The same remedy was approved by the Court of Appeals for the Fifth Circuit in *Jackson Tile Mfg. Co. v. NLRB*.[28] However, the Board order[29] in that case indicated that the employer encouraged employees not to read a notice posted in accordance with an earlier settlement, and further, that some of the employees were illiterate, problems of dissemination which were not present in *IUE*. Furthermore, the *Jackson* court did not have under review a Board order allowing the union access to the employees to explain its position, as did *IUE*. The viability of *Jackson,* however, appears to be in doubt by virtue of a later Fifth Circuit case[30] in which the court refused, despite the finding that some of the employees were illiterate, to enforce such an order because it was "unnecessarily embarrassing and humiliating to management, rather than effectuating the policies of the Act."[31]

The recent case of *J. P. Stevens & Co. v. NLRB*[32] suggests that there may be a purpose other than the dissemination of information to employees behind an order requiring a reading by the employer. "[The order was designed] 'to undo the effect' of numerous and egregious unfair labor practices by insuring that the full counteracting force of the remedial order would be felt by the employees."[33] The restoration of the

26. *Id.* at 2083.
27. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1964).
28. 272 F.2d 181 (5th Cir. 1959).
29. Jackson Tile Mfg. Co., 122 N.L.R.B. 764 (1958).
30. NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859 (5th Cir. 1966).
31. *Id.* at 869. The *Laney* court does not mention the *Jackson* case, let alone expressly overrule it. Of course, the court could not overrule it without disregarding the fact that the reviewing court is to judge each remedy as it is applied to the particular situation and is not to categorically reject any remedy as never appropriate. However, it is interesting to note that the facts involved in both cases were similar. Both were concerned with flagrant violations of section 8(a)(1) of the NLRA through interrogation of employees concerning their union activity, surveillance of union activities, and general coercion. Also, both involved the discriminatory discharge of employees. But, perhaps the major distinction is that, since the union had succeeded in its effort to become the employees' bargaining agent, the *Laney* court was free to merely uphold the Board order requiring the employer to bargain with the union. In *Jackson,* the union had not obtained a majority, and perhaps it was felt that the forced reading was necessary to give the union a fair chance of obtaining one.
32. 380 F.2d 292 (2d Cir. 1967).
33. *Id.* at 305. See IUE v. NLRB, 66 L.R.R.M. 2081, 2083 (D.C. Cir. September 6, 1967) (dissenting opinion).

status quo is recognized as a primary purpose of the Board's remedy[34] and there can be little doubt that requiring the employer to read the notice to all employees will help to restore it. An assembly of all employees during working hours to inform them as to their rights would seem to carry more authority than word of mouth communication, or even the posting and mailing of notices.[35] However, in the instant case the court has already approved of granting the union access to all the employees for one hour during company time to make a speech, in itself a novel and somewhat drastic order.[36] This action will have essentially the same effect in restoring prior conditions, thus questioning the necessity of imposing upon the employer the embarrassing duty of personally informing the employees of their rights. Furthermore, it would seem that remedies ostensibly designed to undo the effect of unfair labor practices, by their very nature, run the risk of being punitive. A forced reading to the employees is an example, especially here, where the other approved remedies make such a reading unnecessary. As stated in an earlier District of Columbia Court of Appeals decision, "the purpose of Board remedies is to rectify the harm done the injured workers, not to provide punitive measures against errant employers. '[T]he power to command affirmative action is remedial, not punitive.' "[37] This holds true, "even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."[38]

It is suggested that the court reached the right conclusion in rejecting the order requiring the employer to read the notice to employees, despite the superficial analysis proffered in its support. In this particular situation, the policies of dissemination of information and return of the status quo do not, as a result of other effective available remedies, call for the imposition of remedies which may be humiliating, embarrassing, or possibly punitive. The court stated that this remedy was not inappropriate in all cases,[39] but since no guidelines for its application are offered, it must be presumed that such an order approaches acceptability only where the dissemination of information presents a unique problem,[40] or where the restoration of the status quo is not already adequately provided for by other remedies, such as union access to the employees for a one hour speech.

In *Stevens,* the Second Circuit Court of Appeals modified a similar Board order by giving the employer the choice of reading the notice him-

34. *See* cases cited note 8 *supra.*

35. *Cf.* H. W. Elson Bottling Co., 155 N.L.R.B. 714, 716n.7 (1965).

36. "[R]equiring the company to pay employees to listen to a union speech on company property is fairly 'strong medicine.'" NLRB v. H. W. Elson Bottling Co., 379 F.2d 223, 226-27 (6th Cir. 1967).

37. Local 57, Int'l Ladies' Garment Workers' v. NLRB, 374 F.2d 295, 303 (D.C. Cir.), *cert. denied,* 387 U.S. 942 (1967).

38. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938). *See* cases cited note 14 *supra.*

39. 66 L.R.R.M. at 2083.

40. Thus, the order would be more appealing where, for example, the employees were blind or illiterate.

self, or having it read by a Board representative, maintaining that this would guarantee effective communication and help restore prior conditions, without subjecting the employer to humiliation. The *IUE* court considered this approach and rejected it as "creat[ing] a problem more severe than the one it supposedly solves."[41] The first basis for the rejection of the *Stevens* approach was that it was a de novo remedy being prescribed by the court, and that this ran "counter to the premise that remedies should be worked out by those having the most experience and expertise in the area."[42] In contradiction, the *Stevens* court was of the opinion that it was merely modifying a Board order, a procedure permitted by section 10(e) of the National Labor Relations Act.[43] It would appear that the essence of the Board remedy in *Stevens* was the gathering of all the employees so that they might be orally informed of their rights. In view of this, the question narrows merely to that of deciding who shall convey the information. To grant the employer the option of having a Board representative read the order is merely another method of implementing the remedy, hardly more than a modification, as opposed to a new remedy.

The more important ground for the rejection of the *Stevens* solution is that the reading of the notice by the Board representative would cast the Board in a position of less than complete neutrality, placing its imprimatur on the particular union's activities and on union activities in general. While it must be conceded that allowing a Board representative to read the notice creates a possibility that some employees will think the Board is not neutral, this same possibility exists when employees see a copy of the Board order on the plant bulletin board, receive copies of it in the mail, or see that the Board has ordered the employer to allow the union to speak with them during working hours. Surely all the employees are aware of the litigation involved, and that the Board has ordered these resultant remedies. The only distinction is that the *Stevens* solution brings a Board representative physically on the scene, and it is difficult to see how this, without more, will create the problems that the majority foresees.

While it is felt that the court was incorrect in refusing to modify in accordance with *Stevens* on the above two bases, it is suggested that its final solution was correct, because the modification was unnecessary in light of the other approved remedies. Nevertheless, in cases where the communication of information and the restoration of prior conditions have not already been adequately provided for by other remedies, such a modification would be appropriate, since it has all the advantages of the forced reading without the attendant humiliation. Therefore, contrary

41. 66 L.R.R.M. at 2082n.5.

42. *Id.*

43. 29 U.S.C. § 160(e) (1964).

to the conclusion of the *IUE* court,[44] it is difficult to foresee any situation where the forced reading would be appropriate.

There has been increasing pressure for stronger remedies to deter flagrant unfair labor practices,[45] and the orders under review in the instant case are illustrative of the National Labor Relation Board's recent attempts to cope with such situations. But often, as here, the reviewing courts have felt that such orders go beyond the Board's 10(c) power, thereby lending support to the argument that the more realistic solution lies in congressional legislation.[46]

David H. Huggler

LABOR LAW — UNIONS — UNION MEMBER MUST EXHAUST INTRA-UNION APPELLATE PROCEDURES BEFORE FILING UNFAIR LABOR PRACTICE CHARGE.

Industrial Union of Marine Workers v. NLRB (3d Cir. 1967)

Holder, a member of petitioner, filed intra-union charges with his local in which he alleged a violation of section 8(b)(1)(A) of the Taft-Hartley Act[1] in that the local president had wrongfully caused his employer to

44. 66 L.R.R.M. at 2083; see p. 427 *supra*.

45. *See* 19 VAND. L. REV. 512, 514–15 (1966) *citing* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 124–39 (1964), which suggests as illustrative of the stronger remedies proposed: criminal sanctions for wilful violations, punitive damages, greater use of the preliminary injunction, and the ordering of the employer to bargain with the union where it does not represent a majority of the employees. *See* Note, *The Need For Creative Orders Under Section 10(c) of The National Labor Relations Act*, *supra* note 10, at 81–90.

46. For recent developments in this area, see 1 LAB. REL. REP., 65 Analysis 53–56 (July 31, 1967).

1. 29 U.S.C. § 158(b)(1)(A) (1964), which reads:

> It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .

Section 7, 29 U.S.C. § 157 (1964), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . . .

discriminate against him. These charges were dismissed by the local, and Holder, disregarding the International Constitution's requirement that a member exhaust intra-union appellate procedures before bringing an administrative or judicial action, filed an 8(b)(1)(A) unfair labor practice charge with the National Labor Relations Board alleging the same conduct which had comprised his unsuccessful complaint before the local. The charge was dismissed by the General Counsel. Subsequently, petitioner found Holder to have violated the International Constitution, and dismissed him from membership. After an unsuccessful appeal for reinstatement, heard by the General Executive Board of the International, Holder again filed an 8(b)(1)(A) charge with the NLRB alleging that petitioner's action in dismissing him from membership was an unfair labor practice. The Board, applying the rule enunciated in the *Charles S. Skura*[2] case, found an unfair labor practice and issued a remedial order.[3] On appeal, the Third Circuit Court of Appeals reversed, *holding* that the proviso to section 8(b)(1)(A) of the Taft-Hartley Act, substantiated by the proviso to section 101(a)(4) of the Landrum-Griffin Act,[4] permits unions to establish and enforce rules requiring its members to exhaust reasonable intra-union appellate procedures. *Industrial Union of Marine Workers v. NLRB,* 379 F.2d 702 (3d Cir. 1967), *petition for cert. filed,* 36 U.S.L.W. 3205 (U.S. Nov. 6, 1967) (No. 796).

Before the court considered the effect of the 8(b)(1)(A) and 101(a)(4) provisos on the disciplinary action taken by the union in the instant case, it focused on section 7 of the Taft-Hartley Act[5] to ascertain whether a union member's right to institute proceedings with the NLRB was guaranteed by that section.[6] The court noted that nowhere in the text of section 7 is there mentioned anything about a right to file charges with the Board[7] and indicated that the rationale of the Board in *Skura,* whereby the Board engrafted upon section 7 "a general right of unlimited

2. 148 N.L.R.B. 679 (1964).

3. Edwin D. Holder, 62 L.R.R.M. 1301 (June 23, 1966).
The Board's order to the union read:

> Cease and desist from expelling members for filing charges with NLRB; in any like or related manner, interfering with employees' LMRA rights. Upon request, reinstate employee to membership without requiring payment of back dues for period of expulsion except for portion of dues found to [be] [*sic*] allocable to cost of union's welfare benefits and with reimbursement with 6 percent interest for any loss suffered as result of absence of such benefits; post notices. 62 L.R.R.M. at 1302.

4. 29 U.S.C. § 411(a)(4) (1964) reads in part:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency . . . *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations. . . .

5. For the text of section 7 see note 1 *supra.*

6. Restraint or coercion employed by a union against a member for exercising a right guaranteed by section 7 is a section 8(b)(1)(A) unfair labor practice. *See* note 1 *supra.*

7. Industrial Union of Marine Workers v. NLRB, 379 F.2d 702, 706 (3d Cir. 1967).

access to the Board," was unacceptable.[8] The correct view, it asserted, is that by necessary implication the right to file particular charges before the Board is protected by section 7 only when "the charges themselves . . . assert misconduct which, if proved, would constitute a deprivation of rights declared in that section."[9] The court then indicated that the case would have been remanded to the NLRB for a determination of the subject matter of Holder's initial complaint if the 8(b)(1)(A) and 101(a)(4) provisos had not otherwise mandated reversal of the Board's order.[10]

When the issue of a union's right to discipline a member for filing a charge with the NLRB before first exhausting prescribed intra-union appellate procedures came before the Board in *Charles S. Skura,* it held that under section 8(b)(1)(A) an unfair labor practice was committed by the union for imposing the discipline.[11] The District of Columbia Circuit Court of Appeals subsequently adopted the *Skura* rule in *Roberts v. NLRB.*[12] In both *Skura* and *Roberts,* a member was fined by his union for instituting administrative proceedings before first exhausting the prescribed intra-union appellate procedures. In *Skura,* the NLRB found that a fine was by nature coercive and that its imposition restrained and coerced the member in the exercise of his right to file charges with the Board.[13] Furthermore, it made no difference that the fine was allegedly levied upon the member to enforce a union rule requiring exhaustion of intra-union appellate procedures since such a rule was not protected by the proviso of section 8(b)(1)(A).[14] The Board reasoned:

> Considering the overriding public interest involved . . . no private organization should be permitted to prevent or regulate access to the Board, and a rule requiring exhaustion of internal union remedies by means of which a union seeks to prevent or limit access to the Board's processes is beyond the lawful competency of a labor organization to enforce by coercive means.[15]

The Board in the *Skura* case also held that section 101(a)(4) of the Landrum-Griffin Act prohibited the union's disciplinary action notwithstanding the proviso of that section which states that a union member may be required to exhaust reasonable hearing procedures (but not to exceed a

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8. *Id.* at 706–07.

9. *Id.* at 706.

10. *Id.* at 707.

11. 148 N.L.R.B. 679 (1964); *accord,* Van Camp Sea Food, 62 L.R.R.M. 1298 (June 21, 1966).

12. 350 F.2d 427 (D.C. Cir. 1965).

13. 148 N.L.R.B. at 682.

14. *Id.* In reaching this conclusion, the NLRB distinguished it's earlier Russell Scofield (Wisconsin Motor case) decision, 145 N.L.R.B. 1097 (1964), where it was decided that the proviso to section 8(b)(1)(A) protected a union's disciplinary action against a member who violated an internal union rule establishing earning ceilings, since such a rule was a matter of internal union affairs, over which Congress intended no regulation.

15. 148 N.L.R.B. at 682.

four month lapse of time) within his union before invoking the aid of the courts or an administrative agency.[16] The Board relied on an interpretation of this proviso by the Second Circuit Court of Appeals in *Detroy v. American Guild of Variety Artists*[17] where it was held that this proviso applied to the ability of a court or an administrative agency to require a union member to exhaust reasonable intra-union hearing procedures that have been established by the member's union.[18] The Board therefore concluded that a union could not impose sanctions on a member for failure to exhaust reasonable intra-union hearing procedures under authority of the 101(a)(4) proviso because that proviso was not addressed to unions, but rather to courts or administrative agencies.[19]

The Third Circuit in *Marine Workers,* contrary to the Board, did not feel that a union rule requiring a member to exhaust intra-union remedies before making application for relief to the NLRB or the judiciary was violative of public policy.[20] The court concluded that only those rules, promulgated by a union pursuant to the 8(b)(1)(A) proviso,[21] which had the effect of frustrating the operation of the Act would be proscribed.[22] A rule requiring a union member to *postpone* his right to file charges with the Board "until after a practical and reasonable resort to internal remedies" does not impede "the normal and proper administration of the Act."[23] Thus, the court distinguished between a union rule which completely prevents a member's access to administrative or judicial proceedings and a rule which merely postpones this access. The court did indicate, however, that a union member would have *immediate* access to the courts or an administrative agency to obtain a determination of whether an intra-union remedy is in fact available, and if so, whether resort to it would impose unreasonable delay or hardship upon the member.[24] The court thereby

16. For the text of section 101(a)(4) see note 4 *supra.*

17. 286 F.2d 75 (2d Cir. 1961), *cert. denied,* 366 U.S. 929 (1961).

18. *Id.* at 78. *But see* Sheridan v. Carpenters Local 626, 306 F.2d 152 (3d Cir. 1962) (concurring opinion).

19. 148 N.L.R.B. at 684.

20. 379 F.2d at 707. In Witmer, *Civil Liberties And The Trade Union,* 50 YALE L.J. 621, 630 (1941), the author concluded:

> Freedom of litigation, for instance, is hardly so essential a part of the democratic process that the courts should be asked to strike down all hindrances to its pursuit. The courts are as wise, to take an example of this, in adhering to the general requirement that all available remedies within the union be exhausted before redress is sought before them. . . .

21. As the proviso to section 8(b)(1)(A) permits union rules with respect to the acquisition or retention of membership therein, it conceivably could be argued that a rule requiring exhaustion of intra-union remedies is not a rule with respect to retention of membership and thus not entitled to protection under the proviso. However, this proviso has been given broad interpretation so that rules regulating strictly internal union affairs have been given protection under the proviso even though they did not pertain to retention of membership per se. *See, e.g.,* Price v. NLRB, 373 F.2d 443 (9th Cir. 1967); Tawas Tube Products Case, 151 N.L.R.B. 46 (1965) (rules forbidding attempt to decertify union); Russell Scofield (Wisconsin Motor case), 145 N.L.R.B. 1097 (1964) (rule establishing earning ceilings).

22. 379 F.2d at 707.

23. *Id.*

24. *Id.*

foreclosed any possibility of unions utilizing exhaustion rules to harass members desiring redress from the union for alleged wrongs.

Procedurally, a union member would obtain a determination of the reasonableness of his intra-union appellate procedure by seeking an injunction in a district court, pursuant to section 102 of the Landrum-Griffin Act,[25] to enjoin enforcement of the union's exhaustion rule, alleging that the procedure violated section 101(a)(4) of the Act. This latter section, a part of the "Bill of Rights" for union members, guarantees the member an opportunity to sue his union, provided, however, that he may be required to exhaust the union's "reasonable hearing procedures."[26] Therefore, if the union's procedure was unreasonable, the language of the proviso would preclude the use of it to limit a member's access to the courts. This necessarily implies that a member must have an opportunity to test the reasonableness of the intra-union remedy without fear of union reprisal, since, without such opportunity, the member could conceivably be compelled to comply with unreasonable intra-union remedies in contravention of section 101(a)(4). Furthermore, a member would not be ignoring his union's exhaustion rule by bringing this action since his sole purpose would be to obtain an independent appraisal as to the reasonableness of the prescribed exhaustion procedure.[27]

Conceivably, the *Marine Workers* court could have grounded its opinion solely on an interpretation of the proviso of section 8(b)(1)(A) of the Taft-Hartley Act. Instead, however, the court chose to render an interpretation of the controversial proviso to section 101(a)(4) of the Landrum-Griffin Act.[28] As a result of its interpretation of this proviso, the court concluded that the result it had reached under 8(b)(1)(A) was the only one possible because the proviso of section 101(a)(4) mandated that result.[29]

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25. 29 U.S.C. § 412 (1964) reads in part:

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

26. See note 4 *supra* for the text of section 101(a)(4).

27. Section 3 of the Landrum-Griffin Act, 29 U.S.C. § 402(O) (1964), states that a person may lose membership by being "expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization." But, if a member is expelled for bringing an action to determine the reasonableness of the intra-union remedy, it is not, according to the instant decision, by *lawful* provisions of the constitution and bylaws. Therefore, the member is wrongfully expelled from membership and remains a member in good standing and entitled to relief. *See* Addison v. Grand Lodge of Int'l Ass'n of Machinists, 318 F.2d 504, 508 (9th Cir. 1963). Similarly, if a union restrained or coerced a member in some manner less drastic than expulsion, as for example, by fining the member for initiating an action before a court or an administrative agency to determine the reasonableness of the intra-union appellate procedure, that fine would be set aside by a court or administrative agency as a violation of the member's implied right under section 101(a)(4) to bring the action.

28. *See generally* Berchem, *Labor Democracy in America: The Impact of Titles I & IV of The Landrum-Griffin Act*, 13 VILL. L. REV. 1, 17-26 (1967).

29. 379 F.2d at 708.

The critical question under the 101(a)(4) proviso is *who* may require a union member to exhaust prescribed intra-union appellate procedures before that member may avail himself of the processes of the courts or an administrative agency. The landmark case interpreting this proviso is *Detroy v. American Guild of Variety Artists*[30] in which the Second Circuit Court of Appeals held that this proviso was intended by Congress to apply to courts and administrative agencies in that it was a modified codification of the common law doctrine of exhaustion of remedies.[31] The Third Circuit in the instant case specifically rejected the *Detroy* court's interpretation of the 101(a)(4) proviso by stating: "We think this construction does violence to the structure and the sense of section 101."[32] The court concluded that the logical interpretation of the proviso is "that *a union* . . . may require that the member first devote not more than four months to reasonable grievance procedures within the organization."[33]

Although one commentator has observed that "the legislative history gives little guidance" in discerning the congressional intent as to the scope of 101(a)(4)'s proviso,[34] a consideration of this history seems to support the interpretation proffered by the court in the instant case. Probably the clearest statement of the congressional intent in enacting the proviso was made by Senator Kennedy,[35] then the Chairman of the Conference Committee, who said that the four month restriction in the proviso relates to *union*-imposed restrictions rather than to those imposed by the judiciary.[36] Since section 101(a)(4) was primarily drafted by the Senate,[37] the Kennedy statement would seem to be a more reliable

30. 286 F.2d 75 (2d Cir. 1961), *cert. denied,* 366 U.S. 929 (1961). *See* p. 432 *supra.*

31. 286 F.2d at 78.

32. 379 F.2d at 708.

33. *Id.* (emphasis added), *quoting from* Sheridan v. Carpenters Local 626, 306 F.2d 152, 160 (3d Cir. 1962) (concurring opinion). *See* O'Donoghue, *Protection of a Union Member's Right to Sue Under the Landrum-Griffin Act,* 14 CATHOLIC U.L. REV. 215, 222–23 & n.34 (1965).

34. Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 MICH. L. REV. 819, 841 (1960). For a comprehensive analysis of the legislative history of section 101(a)(4) see O'Donoghue, *supra* note 33 at 223–36.

35. O'Donoghue, *supra* note 33 at 234. See reference to Kennedy statement in Berchem, *supra* note 28, at 19 n.120.

36. 105 CONG. REC. 17,899 (1959) (remarks by Senator Kennedy). *See generally* Sherman, *The Individual Member and the Union: The Bill of Rights Title in the Labor-Management Reporting and Disclosure Act of 1959,* 54 NW. U.L. REV. 803, 818–19 (1960); Smith, *The Labor-Management Reporting and Disclosure Act of 1959,* 46 VA. L. REV. 195, 206–07 (1960). *But see* Cox, *supra* note 34 at 839–41.

In the same passage Senator Kennedy indicated that the NLRB or the courts would not be precluded from entertaining a suit by a member before the expiration of four months. This would indicate that Congress did not wish to preclude a union member's suit if the remedies established by the union were unreasonable. *See* pp. 432–33 *supra.*

37. O'Donoghue, *supra* note 33, at 234.

source of legislative intent than the more frequently used House history, which tends to support the interpretation rendered in *Detroy*.[38]

There is also a strong policy argument favoring the present court's holding. The Landrum-Griffin Act was passed by Congress in order to permit unions great latitude in handling their internal controversies[39] with the hope of thereby obtaining greater union democracy.[40] It would foster this congressional intent if unions established reasonable democratic procedures to cope with internal grievance problems. The benefits derived from such procedures within unions are numerous. As the court in the instant case mentioned, the case load of the NLRB and the courts would be greatly reduced if union members could reasonably obtain remedies within their organizations.[41] Also, even if the member could not adequately settle his grievance within his union, the court or Board would obtain valuable insight by having the issues previously reviewed by the union's trial board.[42] Finally, the aggrieved member would reap a financial benefit if his complaint was adequately settled within his union, for he would save the legal fees required to bring an NLRB or judicial action.[43]

However, it is only by the use of intra-union appellate procedures that these benefits will be assured. As one commentator has said, "Democratic processes atrophy when they are not exercised; union members will have no interest in improving their organizations' internal adjustment procedures if they never are required to use them."[44] The use of intra-union appellate procedures is insured under the present holding, because a member would be faced with the possibility of union sanctions if he ignored them.[45] Since, however, the member would not have to

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38. *See* Detroy v. American Guild of Variety Artists, 286 F.2d 75, 78 n.2 (2d Cir. 1961), *quoting from* 105 CONG. REC. App. A7,915 (daily ed. Sept. 4, 1959) (remarks by Rep. Griffin), "[e]xisting decisions which require, or do not require, exhaustion of such remedies are not to be affected except as a time limit of 4 months is superimposed."

39. Calhoon v. Harvey, 379 U.S. 134, 140 (1964).

40. Simmons v. Avisco, Local 713, Textile Workers, 350 F.2d 1012, 1016 (4th Cir. 1964); Harris v. International Longshoremen's Ass'n, Local 1291, 321 F.2d 801, 805 (3d Cir. 1963).

41. 379 F.2d at 707; *accord,* Mamula v. United Steelworkers, 414 Pa. 294, 297, 200 A.2d 306, 308 (1964).

42. *See* Detroy v. American Guild of Variety Artists, 286 F.2d 75, 79 (2d Cir. 1961), *cert. denied,* 366 U.S. 929 (1961); Mamula v. United Steelworkers, 414 Pa. 294, 297, 200 A.2d 306, 308 (1964).

43. Resort to judicial remedies is very costly to a union member. Summers, *Legal Limitations on Union Discipline,* 64 HARV. L. REV. 1049, 1095 (1951).

44. Aaron, *The Labor-Management Reporting And Disclosure Act of 1959,* 73 HARV. L. REV. 851, 869 (1960).

45. It has been held that "a union cannot discipline its members except for offenses stated in its constitution and by-laws. . . ." Simmons v. Avisco, Local 713, Textile Workers, 350 F.2d 1012, 1017 (4th Cir. 1965) which cited Allen v. Alliance of Moving Picture Operators, 338 F.2d 309, 316 (5th Cir. 1964), where the court stated:

> In determining whether discipline was properly imposed . . . any ambiguity or uncertainty in the constitution must be construed against the union and in favor of the member, in accordance with well established principles of documentary construction.

Therefore, the union member will have prior notice of the consequences of his failure to comply with a union exhaustion rule, thereby precluding an ex post facto punishment by his union. *See generally* Summers, *supra* note 43, at 1058-62.

comply with unreasonable intra-union appellate procedures, the unions would be forced to rectify any inequities inherent in their procedures.[46] Thus, in the long run, democracy would prevail, and the member would be assured of getting a fair hearing within his union.

Since the present decision does not entirely preclude a member's access to an independent tribunal, it is not a complete reversal of the idea expressed in *Skura* and *Roberts,* cases which were concerned with protecting the union member against unreasonable restraints by his union. Rather, it seems to be a step in the evolution of a sound labor policy, whereby the evils of a complete denial of access to the court's processes are eliminated, but the advantages obtained by having reasonable intra-union appellate procedures are assured.

Edward J. Ciechon, Jr.

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46. An example of a union appellate procedure amended to comply with the Landrum-Griffin Act is presented in Harris v. International Longshoremen's Ass'n, Local 1291, 210 F. Supp. 4, 6-7 (E.D. Pa. 1962), *aff'd,* 321 F.2d 801 (3d Cir. 1963).